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TEAMSTER'S CENTRAL STATES PENSION FUND REFORM AND ERISA ENFORCEMENT REMEDIES

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

JULY 26, 1982

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TEAMSTERS' CENTRAL STATES PENSION FUND EFORM AND ERISA ENFORCEMENT REMEDIES

MONDAY, JULY 26, 1982

House of Representatives,
Committee on Ways and Means,
Subcommittee on Oversight,
Washington, D.C.

The subcommittee met at 9 a.m., pursuant to notice, in room
00, Longworth House Office Building, Hon. Charles B. Rangel
hairman of the subcommittee) presiding.

[The press releases announcing the hearing follow:]

[Press release of July 9, 1982]

ON. Charles B. Rangel, Chairman, Subcommittee on Oversight, Committee on
Ways and Means, Announces Hearing on the Teamsters' Central States
Pension Fund Reform and ERISA Enforcement Remedies

The Honorable Charles B. Rangel, Chairman of the Subcommittee on Oversight of
e Committee on Ways and Means, announced today that a hearing will be held to
view the progress of the Government's efforts to enforce reform of the Teamsters'
ntral States Pension Fund and the adequacy of enforcement remedies currently
ailable under the Employee Retirement Income Security Act of 1974 (ERISA). The
act time and place of the hearing will be announced at a later date.

This hearing is being held in connection with this Subcommittee's long-standing
amination, which began in 1977, of the Government's enforcement efforts regard-
g this troubled Fund. The Subcommittee will examine whether the Government
s effectively and comprehensively used all available mechanisms under ERISA
ich assure complete, lasting reform of the Fund, and consequently, the security of
tirement benefits for its 500,000 participants and beneficiaries.

October 3, 1982, marks the date on which the Fund's current agreement with
alified independent asset managers expires. The Government has consistently
aintained that having the $3.5 billion Fund under the control of qualified inde-
ndent asset managers is essential to guarding against renewed misuse of the
nd. The Subcommittee will examine what the Government and the Fund trustees
pect to happen after October 3, 1982.

In addition, this hearing is being conducted in direct response to a recent request,
bmitted by the Departments of the Treasury and Labor, that the Committee on
ays and Means consider and take prompt action on legislation to provide an addi-
nal remedy, besides revocation of an IRS favorable determination letter, under
RISA to better and more effectively safeguard plan assets. The Departments, in
king this request, cited the Teamsters' Central States Pension Fund case as
arly illustrative of the need for such legislation, and urged that such legislation
enacted to assure that the Fund's assets continue to be managed by qualified in-
pendent asset managers after October 3, 1982.

Testimony at the hearing will be limited to invited witnesses, including witnesses
presenting the Department of the Treasury, the Department of Labor, the Gener-
Accounting Office, and the Central States Pension Fund.

[Press release of July 21, 1982]

HON. CHARLES B. RANGEL, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, COMMITTEE ON WAYS AND MEANS, ANNOUNCES FURTHER DETAILS ON THE HEARING ON THE TEAMSTERS' CENTRAL STATES PENSION FUND REFORM, AND ERISA ENFORCEMENT REMEDIES

The Honorable Charles B. Rangel, Chairman of the Subcommittee on Oversight of the Committee on Ways and Means, today announced further details on the hearing (previously announced in press release #22) to review the progress of the Government's efforts to enforce reform of the Teamsters' Central States Pension Fund and the adequacy of enforcement remedies currently available under the Employee Retirement Income Security Act of 1974 (ERISA). The hearing will be held on Monday, July 26, 1982, at 9:00 a.m. in Room 1100, Longworth House Office Building.

Testimony at the hearing will be limited to invited witnesses, including witnesses representing the Department of the Treasury, the Department of Labor, the General Accounting Office, and the Central States Pension Fund.

Chairman RANGEL. The Subcommittee on Oversight of the Committee on Ways and Means will come to order.

This is a hearing before the Oversight Subcommittee of the Committee on Ways and Means. We are here once again for the purpose of examining the Government's efforts to enforce permanent reform of the Central States Pension Fund, and the adequacy of enforcement remedies currently available under the Employee Retirement Income Security Act of 1974 (ERISA).

This hearing marks the ninth day of formal hearings, and countless hours of monitoring, over a period of more than 5 years by this subcommittee alone on this very same subject.

Over 5 years ago today, the Government imposed a series of reforms on this troubled fund as a condition to granting the fund continued tax-exempt status. One of those conditions was the assignment of the fund's asset management to independent outside investment managers. The Government has steadfastly maintained that this condition, the presence of independent outside asset managers, is the most important of those reforms. And indeed, the Government once again, in the latest 1981 IRS determination letter, has conditioned the fund's continued tax-exempt status on the presence of an independent outside asset management arrangement.

But also, most importantly, less than 3 months from today, on October 3, 1982, the fund's current agreement with qualified independent asset managers expires. We want to know what is going to happen then. And so we are here today to ask the same questions that this subcommittee has asked for more than 5 years:

Has the Government succeeded in enforcing complete reform of this fund?

Are the reforms permanently and securely in place?

Where are we today, and where are we headed tomorrow with respect to the capability of ERISA to protect the pension benefits of the more than one-half of a million participants and their beneficiaries of this fund, which has assets totaling more than $3 billion?

We are asking these questions not only for this subcommittee, the full committee and the Congress, or for the participants and benficiaries of this fund, but also for the hundreds of thousands of participants in other private pension plans who are relying on ERISA to safeguard the income security of their retirement years. We want to know if this confidence is well-founded.

This subcommittee's last hearing was held on March 24, 1980. Evidence presented at that hearing clearly showed that the Government had not succeeded in securing complete and lasting reform of this fund. Since that hearing, many important events and changes have taken place:

Both the Labor Department and the Internal Revenue Service have begun new investigations of the fund.

With the advent of the current administration, a new Litigation Strategy Task Force, announced by the Secretaries of the Departments of Labor and the Treasury and the Attorney General, has been established with respect to this fund.

New charges of misuse of fund assets have been made by the Government.

A new executive director of the fund has been appointed.

And settlement negotiations have been conducted between the fund and the Government.

And now, just 2 weeks ago, this administration has informed the Committee on Ways and Means that legislation is needed to provide an additional ERISA enforcement remedy to better safeguard assets of pension funds. Citing the Central States case as illustrative of the need for this legislation, the administration has urged that its proposed legislation be in place by October 3 of this year to insure that the Central States Fund's assets continue to be managed by qualified independent asset managers, and that similar circumstances that may develop regarding other plans are equally addressed.

We now wish to hear from our witnesses who are with us today. Our subcommittee wants to hear in detail what has been going on since our last hearing on this fund, and why the administration has decided that an additional ERISA remedy is now needed, particularly with regard to this case. Why is this legislation needed? Why now?

What would happen if this legislation is not enacted by October 3 of this year? And if this legislation is enacted, can this subcommittee, and all the participants and beneficiaries of the Central States Fund rest assured that permanent reform of the fund is a reality?

On behalf of the subcommittee, I welcome our witnesses. We appreciate your appearance today. We look forward to your testimony. The Chair recognizes Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. I compliment you on calling the hearings.

I now want to welcome the witnesses. I know it will be a fruitful day for all of us. It is something I think we have delayed too long, from November of 1980, to get back into. We did not reach a conclusion at that time. I think we just laid it all aside. So I thank you very much for the hearings, and I look forward to the day.

Chairman RANGEL. Mr. Jenkins?

Mr. JENKINS. I have no statement, Mr. Chairman.

Chairman RANGEL. Mr. Secretary, we thank you for your appearance. We hope you will be able to clear up some of the questions that have been raised by the Congress, the full committee, and the subcommittee.

STATEMENT OF HON. RAYMOND J. DONOVAN, SECRETARY OF LABOR, ACCOMPANIED BY T. TIMOTHY RYAN, JR., SOLICITOR OF LABOR, AND JEFFREY N. CLAYTON, ADMINISTRATOR, PENSION AND WELFARE BENEFIT PROGRAMS

Secretary DONOVAN. Thank you, Mr. Chairman and members of the subcommittee.

It is a pleasure for me to be here today to testify on the adequacy of enforcement remedies presently available to the Government under the Employee Retirement Income Security Act of 1974 and the need for an additional mechanism.

During the course of my presentation, I will use the litigation pending against the Teamsters' Central States Pension Fund as an example of the need for an additional remedy and, in doing so, I will bring the subcommittee up to date on the Government's progress in these cases.

Accompanying me today are T. Timothy Ryan, Jr., the Solicitor of Labor, and Jeffrey N. Clayton, the Administrator of Pension and Welfare Benefit Programs. We will be followed by a panel of representatives of the Treasury Department.

When ERISA was enacted in 1974, it was designed to address two major and extremely serious problems found to exist in the employee benefit plan world. The first was the loss of individual pension benefits despite substantial years of employment. Congress addressed this concern by providing for minimum participation, vesting, and funding standards and by establishing a program to insure the benefits of participants of plans that were terminated. These provisions have played a significant role in insuring that people who have been contributing to plans for years, often their entire working careers, do not lose their basic, inherent right to an expected and well-deserved retirement income.

Congress also recognized the need to protect the financial security of plans. A person's vested right to a retirement income is meaningless if the plan does not have sufficient resources to pay benefits. Therefore, provisions were enacted establishing strict fiduciary standards governing the conduct of plan administrators and trustees. Further, the Government was given statutory tools to enforce these standards.

Since assuming my position as Secretary of Labor, I have repeatedly impressed upon departmental officials my determination that enforcement of ERISA is to be given extremely high priority and high visibility. The potential for abuse is enormous, as are the consequences of abuse to this country's working men and women.

There are presently approximately 50 million workers participating in 560,000 pension plans in this country. The assets of these plans have a present value of approximately $560 billion, and it has been estimated that this figure will skyrocket to approximately $3 trillion in 1995. ERISA also covers approximately 150 million participants and beneficiaries in 4½ million welfare plans nationwide. I am personally committed to assuring that the Government, especially the Department of Labor, takes every appropriate step to guarantee that the statutory protections are preserved and that the statutory integrity of ERISA is upheld.

To this end, I have directed Mr. Clayton and Mr. Ryan to significantly increase their enforcement activities. They have taken a number of steps in this regard. For example, we have greatly increased the level of ERISA litigation. For the 5 years before 1981, only 67 cases were initiated by the Department. However, in fiscal year 1981 alone, the Department initiated 31 cases.

This increased litigation has required us to devote and redirect more of our resources to ERISA. We have expanded the staff assigned to ERISA litigation by over 40 percent. In addition, we have established a pilot program to see if ERISA litigation can be effectively handled on a regional basis.

The PWBP program has taken a number of positive steps, such as giving its field staff more authority to enter into voluntary compliance and placing a new emphasis on detecting criminal violations.

This heightened concern about ERISA enforcement is shared by other Government agencies as well. I am sure the Internal Revenue Service will attest to our cooperative efforts. In addition, since the beginning of this administration, Attorney General Smith, Secretary of the Treasury Regan, and I have personally met on a number of occasions to specifically discuss our coordinated enforcement activities. As a result of these discussions, a high-level litigation working group was created which has met more than 30 times and has proved to be of immense assistance in our litigation efforts.

I feel confident that due to this increased emphasis on ERISA enforcement, the Government's effort and presence will be felt, and that participants and beneficiaries of employee benefit plans should feel secure that we are fulfilling our obligations to protect their rights and benefits.

Under ERISA, the Government has been given a number of tools which enable us to enforce these protections. However, in one area there is a gap which needs to be rectified.

As you know, under the Internal Revenue Code, if a plan receives from the IRS a determination letter with respect to the qualification of the plan for favorable tax treatment and to the exemption of a trust established under the plan from income taxes, the letter may contain a condition on matters such as the management and disposition of plan assets. As the situation exists today, the only remedy potentially available to the IRS should the administrators and/or trustees violate one or more of these conditions is the disqualification of the plan and revocation of the letter.

However, this action can result in severe hardship to innocent parties such as contributing employers to multiemployer plans and employees who are plan participants. The tax benefits that go along with plan qualification would no longer be available as tax deductions to the employers, and the contributions would be currently taxable to the employees with vested interests in the plan. Let me stress, these are innocent individuals who normally play no role in the administration of the benefit plan.

We believe that an alternative remedy is necessary which would allow the Government (1) to enfoce these conditions in court, and (2) to impose sanctions on those individuals who are directly responsible for a violation, without the undesirable attendant consequences to employers and employees that follow revocation of a determination letter and disqualification of the plan.

We have therefore written Chairman Rostenkowski of the full Committee on Ways and Means requesting consideration of legislation which would supplement the "prohibited transactions" provisions of the Internal Revenue Code and ERISA. These new sections would provide that where a plan accepts in writing conditions in a qualification letter relating to the independent asset management of plan assets, and where the trustees or administrators of the plan later violate the conditions, such violations would be per se prohibited transactions. This would allow the IRS to levy a tax on the amount involved in the violation against the culpable trustees and administrators, and it would also allow the Labor Department to immediately seek an injunction to prevent continuation of the violations. Both agencies would have the tools to effectively remedy a serious situation, with the remedies directed solely against those responsible.

The Government's litigation with the Teamsters' Central States Pension Fund provides a prime example of the need for such legislation. This litigation has been a matter of great concern to numerous committees and subcommittees of both the Senate and the House of Representatives. Indeed, this subcommittee has long voiced its interest in the matter as evidenced by hearings dating back to 1977.

It would be helpful for me to quickly review the history of this litigation and then bring you up to date on our recent progress. Through this discussion, I believe that you will understand the need for the legislation we are proposing.

An investigation of the Teamsters' Central States Pension Fund was instituted in 1975. Based on this investigation, the Department of Labor filed suit against 17 former trustees and two officials of the fund to recover losses resulting from their alleged mismanagement of the fund's assets and from breaches of their fiduciary responsibilities. This suit is now captioned *Donovan* v. *Fitzsimmons.*

The suit is presently in the discovery stage, and no trial date has been set. We have depositions of more than 70 persons and have reviewed more than 2 million pages of documents. In the meantime, settlement discussions have been going on since May 1981 involving representatives of the fund and officials of the Department of Labor and the Internal Revenue Service.

Mr. Ryan, the Solicitor of Labor, and Mr. Winborne, an Assistant Commissioner of the IRS, have participated in more than 20 of these meetings. This is indicative of the very high priority we have given this case.

Let me state that we would much prefer to settle the litigation out of court rather than having to resort to a lengthy trial. This would undoubtedly save considerable time and precious resources.

Mr. Chairman, we are being tough in our negotiations, but we are being fair. We will settle only if we are completely satisfied that justice will be done, and that the assets, benefits, and rights of plan participants and beneficiaries are protected. If we cannot secure these ends by voluntary, mutual agreement, we will pursue every avenue in court.

There are numerous subjects of discussion on the table at this point. For example, the former trustees of the fund have taken the position, supported by the current trustees, that the *Fitzsimmons* case should be settled for whatever amounts are available from their fiduciary liability insurance policies. The Government, on the other hand, believes that because the losses far exceed available insurance, there should also be substantial individual personal contribution from the former trustees.

Most of the discussions have centered on the Government's insistence that a mechanism be established that will assure that the assets of the fund, which now are approximately $3.5 billion, continue to be managed by truly independent asset managers. We consider this to be of the utmost importance. Indeed, it is significant to note that following the revocation by the IRS of a determination letter in the mid-1970's, an action widely criticized because of the seriousness of the consequences to those innocent parties, the IRS issued a requalification letter containing the express condition of independent asset management. Subsequently the fund accepted in writing a new determination letter containing the same condition.

We believe that it is imperative that the trustees of the fund abide by that agreed-to condition and also agree to the entry of a consent decree enforceable in the court that requires that the assets of the fund remain in the hands of named fiduciaries who will objectively, competently, and responsibly invest the assets with only the financial return on investments to the participants and beneficiaries in mind, as is required under ERISA.

Let me add that various Members of Congress who are familiar with this case have voiced similar thoughts. And the General Accounting Office, in a recent report, stressed the importance of responsible independent asset management.

Since 1977, the assets of the fund have been independently managed by the Equitable Life Assurance Society of the United States and Victor Palmieri & Co., Inc. During the initial 5 years of the contract, which ends on October 3, 1982, no modifications or termination of the contract could occur without the Secretary of Labor's written consent. In addition, investment policy and investments are controlled by Equitable without influence or interference by the fund's trustees.

In November 1982, Equitable and the fund requested modifications of the fund's trust agreement and Equitable's asset management agreement which would have superseded the 1977 arrangements immediately and which would have extended the contract for 5 years. The modified contract would have permitted the trustees to terminate the contract without cause and without my concurrence. For this reason, and because the modified contract did not have sufficient limitations on the trustees' say on investment policy, I rejected these requests.

Mr. Chairman, during the course of our settlement negotiations, the present executive director and trustees of the fund have agreed orally, subject to settlement of other litigation brought by the Department against the present trustees, to the principle of independent asset management, but they have not agreed that the manager should have control over not only the assets themselves, but also the investment policy. This has been the basis of the present Equitable and Palmieri arrangements, and we believe that the continuation of this policy is wise and warranted under the circumstances. We have not been able to reach agreement on this point.

We have though reached tentative agreement on a number of issues, but on the trustees' part, this is subject to resolving other lawsuits. The Government has negotiated in good faith, and we have seriously and sincerely been attempting to reach a fair and just out-of-court settlement. However, one problem has been that the current trustees of the fund have adopted a virtually all-or-nothing attitude.

The Government believes it appropriate to resolve those issues upon which we have reached agreement, albeit tentative. However, it has been the position of the fund that they will not enter into a consent decree unless practically all of the remaining current issues are settled.

Even if we could resolve all the issues in the *Fitzsimmons* case, the current trustees of the fund have stated that they would not enter into a consent decree unless the Department settles, as well, at least two other pending ERISA cases against them. Two cases, *Donovan* v. *Nellis* and *McDougall* v. *Donovan,* involve entirely different issues than the *Fitzsimmons* case and even different trustees, the present trustees as opposed to the former ones.

It also appears that the current trustees are leaving open the option to require settlement of a third case, *Donovan* v. *Robbins,* which pertains to a different entity, the Central States, Southeast, and Southwest Areas Health and Welfare Fund, as the price for agreeing to a consent decree providing for independent asset management. Recently, the present trustees have even added to their list matters that are currently under investigation, but are not yet in litigation.

The Government is willing to negotiate in good faith on all of these matters. But the linkage of the resolution of these complex matters to the issue of asset management and other issues makes obtaining a suitable consent decree very difficult.

In the meantime, we continue to negotiate to arrive at a suitable agreement. However, the Government is not hopeful that this can be accomplished by the time that independent asset management by Equitable and Palmieri end. At that time, if agreement on a judicially enforceable consent order cannot be reached, the only potential tool the Government will have to enforce the agreed-upon conditions will be revocation of the determination letter.

As I have indicated, we would like alternative remedies to deal with this and other similar situations. Therefore, we would urge the Congress to consider and enact the legislation I outlined earlier.

Let me stress that the enforcement mechanism we are seeking would not only be available for the Central States Teamsters' Pension Fund case. While the scenario I have described brought the need for such an additional mechanism to our immediate attention, these remedies should be available to the Government whenever a plan voluntarily accepts a determination letter containing conditions such as the ones agreed upon by the Central States Teamsters' Pension Fund.

Mr. Chairman, I would like to conclude my prepared remarks by reiterating our determination that ERISA will be enforced effectively and vigorously. We will not disappoint the millions of employee benefit plan participants and beneficiaries who look to the Government for the assurance that their statutory rights will be protected.

We will not disappoint the millions of employee benefit plan participants and beneficiaries who look to the Government for the assurance that their pension and health and welfare plans will be administered and managed by individuals who are worthy of the high trust and responsibility placed on them.

We will not disappoint the millions of employee benefit plan participants and beneficiaries who look to the Government for the assurance that their employee benefit plans will be as solvent as possible. These are our obligations, and they will continue to be discharged fully, vigorously, and effectively.

I would like to thank you again for allowing us this opportunity to appear before you today. We would be pleased to answer any questions you might have.

Chairman RANGEL. Thank you, Mr. Secretary.

The Chair would like the record to indicate that the subcommittee has been joined by Mr. Shannon, and also by Mr. Pickle, a veteran member of this subcommittee who has provided the leadership for the Congress in protecting the rights of those investing their hard-earned dollars in these pension plans.

Mr. Secretary, you indicated on page 12 that the present trustees have added to their list of demands the ending of current investigations that are not in litigation. Are all of those civil matters, or are they criminal matters as well? Page 12: "The present trustees have even added to the list matters that are currently under investigation but not yet in litigation."

Civil?

Secretary DONOVAN. Chairman, they are all civil, yes.

Chairman RANGEL. Well, help me in my thinking.

In 1975, some rather serious criminal charges were directed at the trustees of the central fund and the Teamsters generally, and it appears as though we are talking about settling cases that are civil in nature.

Are you satisfied that those people that violated the Federal criminal law, that those cases have come to trial and been settled one way or the other?

Secretary DONOVAN. I would ask Solicitor Ryan to address that, Mr. Chairman.

Mr. RYAN. Chairman, as you know, at the Department of Labor we handle the civil side of ERISA enforcement. The criminal side is investigated and enforced primarily by the Justice Department.

Chairman RANGEL. Mr. Secretary, you are coming before this committee, you are asking for additional legislative tools in order to assure millions of Americans that the pension funds are going to be protected. This is what our Government has attempted to promise. And we are trying to protect employers' tax deductions for making contribution to these funds and their employees' tax exemptions. We have no problem with our goals.

Now, certainly, as far as the American people are concerned, there is a cloud over these pension funds and, unfortunately, one of the largest unions in the country, and indeed in the world, has been pictured as not in making mistakes, but rather in stealing pension funds that belong to the employees, and in dealing with organized crime and investing in properties in violation of Federal law. So I hope you are not saying that I am talking to the wrong part of Government—you know, that is a Justice matter and all you are dealing with is Labor and IRS matters.

We are here to see what we can do to help our Government give assurances to employers and employees alike that ERISA is going to be around longer than this administration or this Congress. So please try to rethink your answer, and see if you can help me, and I will reframe the question.

Has Justice shared with you whether or not they are satisfied that those who violated the Federal Criminal Code have been indicted, have come to trial, and those cases are out of the way so that we now can get to civil remedies?

Secretary DONOVAN. Well, Mr. Chairman, there are both civil and criminal responsibilities under ERISA. During the initial stages of ERISA, there was a tendency to have casemaking in the civil area, and heavy contribution of resources in that area.

We intend and have brought some better balance to that view.

You asked whether the Justice Department has been satisfied. I would ask Solicitor Ryan to add some additional comment.

Mr. RYAN. Mr. Chairman, we have been working with the Justice Department, not only as part of the litigation strategy task force, but also on a weekly basis with the organized crime strike force. As the Secretary testified, in just the *Fitzsimmons* case, we have deposed over 70 individuals and have discovered over 2 million documents. In the course of this discovery procedure, whenever we determine that there is relevant criminal-type information, we refer that information to the Justice Department.

Chairman RANGEL. Don't you follow through on the information? I don't know, quite frankly, what we are dealing with here. You are asking for some civil remedies to fine people. You are saying that you are anxious to get matters under investigation settled before litigation.

Are you saying to the American people, and I hope you are, that since 1975, with all of the Federal investigations of the Teamsters, the pension fund and the trustees and violations of fiduciary relationships, that DOL and IRS are satisfied that Justice has moved speedily on those matters relating to violations of criminal law. I am talking about gangsters, you know, organized crime, everything like that. And, that now you are asking for tools to deal with the civil matters, relating to how the Government can settle these outstanding cases, whether or not the trustees should personally add to the insurance liability, amounts and whether the Government can make the fund whole.

But, you know——

Mr. DUNCAN. Would the gentleman yield?

Chairman RANGEL. Yes; I do.

Mr. DUNCAN. Mr. Chairman, I think the visitor is entitled to finish his statement. I don't know, in a criminal prosecution, where else you would refer it to except the Justice Department, unless the chairman knows of some other place it could have gone.

I think he is entitled to the courtesy of finishing his answer to the question. I think it is perfectly proper the way he is answering.

Chairman **RANGEL**. I hope he might share with us whether or not Justice has shared anything with DOL.

Thank you, Mr. Duncan.

Mr. **RYAN**. Mr. Chairman, finishing up on my comment, since 1975—I cannot list every single indictment or referral to the Justice Department for criminal prosecution—but there has been at least one conviction of a prior executive director of the fund for kickback, Mr. Baron.

There is ongoing right now work on a trial which will start in September, that involves property owned by the fund, which will take place in September.

As far as cooperation is concerned and referrals are concerned with the Justice Department, from a personal standpoint I think we have the best relationship that I believe has existed between the Labor Department and the Department of Justice's organized crime strike force.

Yes; we give them referrals; they follow up on them.

We are here today to not only provide you with answers to questions on the criminal side, but also to fill a void on the civil side, Mr. Rangel, which is a very real void, and it is a necessary void that should be filled.

Chairman **RANGEL**. Have you finished your statement?

Mr. **RYAN**. Yes, Mr. Chairman.

Chairman **RANGEL**. This case has been going on since 1975. Can you tell me how many people have been indicted?

Mr. **RYAN**. Are you talking about present trustees, prior——

Chairman **RANGEL**. No; I am not. I am talking about the Central States Pension Fund, the Teamsters. That is what I am talking about.

Mr. **RYAN**. We can provide you a list of the individuals indicted since 1975 for the record.

[The following was subsequently received:]

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., August 4, 1982.

Hon. Charles B. Rangel,
Chairman, Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the Subcommittee's July 26 hearing on ERISA enforcement legislation, you requested that we provide you with a list of indictments and convictions involving individuals associated with the International Brotherhood of Teamsters. At your request, the Department of Justice compiled this information which you will find enclosed.

Please let us know if there is any further information which you would like us to supply.

Sincerely,

T. TIMOTHY RYAN, Jr.,
Solicitor of Labor.

Enclosure.

INDICTMENTS AND CONVICTIONS INVOLVING PERSONS ASSOCIATED WITH THE TEAMSTERS UNION (1977-82)

This does not purport to be complete in all respects. All data should be verified with records of the courts indicated. The notation "Final conviction" may refer to either sentencing in the trial court or the final sustaining of the conviction on appeal.

Dated July 1982.

DISTRICT OF ARIZONA

William Wesley McCollum, Officer, IBT Local 310, IBT Joint Council 71; 29 U.S.C. §§ 439, 501(c), embezzlement, 18 U.S.C. § 1962 RICO; 8/10/78 Indictment, 29 U.S.C. § 503; 9/18/78 Guilty Plea.

CENTRAL DISTRICT OF CALIFORNIA

Sten Thordarson, Secretary-Treasurer Local 389; Charles Wise, President, Local 389; Craig Dunbar, Business Agent, Local 389; Martin Fry, Secretary-Treasurer, Local 186; Martin Salgado, Trustee, Bus. Agent, Local 186: Indicted 11/20/79, 18 U.S.C. 1962(d), 1952, 844(i); 29 U.S.C. 501(c): Pending trial.

NORTHERN DISTRICT OF CALIFORNIA

Michael Rudy Tham, Secretary-Treasurer, Chief Executive Officer, Local 856: Indicted 9/27/79, 29 U.S.C. 501(c), 439(c), embezzlement; Convicted 5/21/80; 4/26/82, Cert. denied.

Leroy David Nunes, Former Business Agent, Local 70: Indicted 12/13/79, 29 U.S.C. 186(b); Indictment dismissed 2/7/80.

William Dykstra, Vice President, Local 856: 5/8/79 indictment, 18 U.S.C. 1951; 7/18/79 Conviction.

DISTRICT OF DELAWARE

Francis Sheeran, former President, IBT Local 326: Convicted, 12/11/81; RICO and RICO conspiracy, 18 U.S.C. 1962 and 1962(d); Taft Hartley, 29 U.S.C. 186; mail fraud, 18 U.S.C. 1341; On Appeal.

SOUTHERN DISTRICT OF FLORIDA

Seymour A. Gopman, Consultant for Florida Teamsters Pension Trust; 18 U.S.C. §§ 664, 1954, 1962: 10/12/77 Indictment: 5/28/78 Conviction Final.

NORTHERN DISTRICT OF GEORGIA

Jack D. Ramsey, ex-Union Steward, IBT, Local 528: Convicted of Arson in the First Degree, Ga. Code § 26-1401; 2-13-82: On Appeal.

Betty Ramsey, Chief Steward, IBT, Loal 528: Convicted of Arson in the First Degree, Ga. Code § 26-1401; 2-13-82 On Appeal.

DISTRICT OF HAWAII

Arthur Rutledge, President, IBT Local 996: Civil Contempt (failure to appear before a federal grand jury); 1/24/78 Contempt Citation.

NORTHERN DISTRICT OF ILLINOIS

Alvin Baron, former Assistant Manager, Teamsters Central States, etc., Pension Fund, 18 U.S.C. 1954, 1343, 26 U.S.C. 7201: 6/30/78 Conviction.

David Kaye, Chief Steward, IBT Local 714, Berwyn, Illinois; 18 U.S.C. 1962, 29 U.S.C. 186: 5/16/77 Conviction Affirmed.

Norman Owens, former Official, IBT Local 600, St. Louis; Conspiracy to transport stolen property in interstate commerce: 3/21/78 Pled Guilty.

Grafton Lee Frame, former President, IBT Local 371, Rock Island, Ill.; 29 U.S.C. 501(c): 10/15/80 Conviction; On Appeal.

SOUTHERN DISTRICT OF ILLINOIS

Clement A. Nitka, former Business Agent, IBT Local 50, Centralia, Illinois: 29 U.S.C. 439(c), falsification of union records; 6/3/80 Final conviction.

NORTHERN DISTRICT OF IOWA

Harry J. Wilford, Secretary-Treasurer, Local 238, Cedar Rapids; 18 U.S.C. 1951, 29 U.S.C. 186(b) (1) and (2): Conviction 12-10-81.

Everett G. Dague, Business Representative, Local 238, Cedar Rapids; 18 U.S.C. 1951, 29 U.S.C. 186(b) (1) and (2): Conviction 12/10/81.

Herman J. Casten, Business Representative, Local 238, Cedar Rapids; 18 U.S.C. 1951, 29 U.S.C. 186(b) (1) and (2): Conviction 12/10/81.

Herman Boeding, Union Shop Steward, Local 238, Cedar Rapids; 18 U.S.C. 1951, 29 U.S.C. 186(b) (1) and (2): Conviction 12/10/81.

SOUTHERN DISTRICT OF IOWA

Ralph E. Smith, Secretary-Treasurer, Local 90; 29 U.S.C. 501(c): Conviction 8-17-81; 3-8-82 Aff'd on Appeal.

Wayne G. Elliott, Officer, IBT Local 90; 29 U.S.C. 501(c): Conviction 11-2-81; On Appeal.

MIDDLE DISTRICT OF LOUISIANA

Jacqueline Beth Hall, former Secretary, IBT Local 5, Baton Rouge; 29 U.S.C. 501(c), embezzlement; 12-21-79 Pled Guilty.

DISTRICT OF MASSACHUSETTS

William C. Bratton, Teamster Captain, IBT Local 25: Convicted 3/8/82, RICO, 18 U.S.C. 1962, Mail Fraud, 18 U.S.C. 1341.

Hartley Greenleaf, Teamster Captain, IBT Local 25: convicted 3/8/82, RICO, 18 USC 1962, Mail Fraud, 18 USC 1341.

Joseph "Gus" Manning, Trustee and Organizer, IBT Local 25, Charleston, 18 USC 1962(c), 1027, 1341, 1510, 1951, 1952 and 2314: 6/11/81 Indictment.

EASTERN DISTRICT OF MICHIGAN

Mayer Morganroth, Attorney, IBT, Detroit; 18 U.S.C. §§1341, 1343, 371: Mail and wire fraud; 5/29/79 Indictment; 3/25/80 Acquitted.

Charles L. "Chuckie" O'Brien, General Organizer, IBT, Southern Conference; 18 U.S.C. §1014: 3/13/79 Conviction affirmed on appeal, 29 U.S.C. §186; 7/7/76 Indictment; 1/8/79 Conviction final by U.S. Supreme Court.

Joseph M. Bane, Sr., Former President, IBT Local 614, Pontiac: 29 U.S.C. §501(c) Embezzlement; 8/25/78 Conviction affirmed, 18 U.S.C. §1951; 8/2/78 Indictment; 1/19/79 Final Conviction.

Joseph M. Bane, Jr., Business Agent, former Trustee, IBT Local 614, Pontiac; Hobbs Act (extortion): 10/26/78 Guilty Plea; 1/19/79 Sentenced, final conviction.

Emidio "Mitch" Gentile, Business Agent, IBT Local 614, Pontiac; extortion: 10.26/78, Guility Plea; 1/19/79 Sentenced, final conviction.

Norman Meints, former Secretary-Treasurer, IBT 794: Mail fraud, conspiracy, and embezzlement of union funds, 12/22/77.

Richard Fitzsimmons, Officer, IBT Local 299, 18 U.S.C. §§664, 371: Embezzlement from benefit plans; 2/25/77 Indictment; 1978 Acquittal. General Organizer, Teamsters International: Indicted 8/2/79, 18 U.S.C. 1962, 29 U.S.C. 186; 12/14/79 Guilty Plea.

Edward Petroff, Jr., President, ITB Local 376; 18 U.S.C. 1951, 29 U.S.C. 186: 9/5/79 Indicted; 11/21/79 Convicted, 29 U.S.C. 186.

Anthony Sciarrotta, Officer, IBT Local 299; 18 U.S.C. §§664, 371: 2/25/77 Indictment; 1978 Acquitted.

Roby G. Smith, Former Business Agent, IBT Local 299; Current Business Agent, IBT, Local 406, Grand Rapids; 18 U.S.C. §1951, Hobbs Act: 4/18/78 Mistrial, trial judge died. 8/1/79 Extoration and conspiracy, 18 U.S.C. 1951; Conviction after retrial.

Neil J. Dalton, Secretary-Treasurer, IBT Local 486, Saginaw; Vice Chairman, Joint Council 43, Michigan Conf. of Teamsters; 29 U.S.C. 501(c), 18 U.S.C. 1962(c): 4/1/81 Convicted.

Jack D. Thompson, former President, IBT Local 332, Flint; 29 USC 186(a), 18 USC 371: 1/23/81 Indictment; 2/13/81 Pled Guilty.

DISTRICT OF NEW JERSEY

Gabriel Briguglio, former Vice President, IBT Local 84; 18 U.S.C. 1962, 29 U.S.C. 186: Conviction 7/10/79.

Joseph Campisano, former President, IBT Local 945 and Trustee of Welfare Fund and Severance Fund, West Paterson; 18 U.S.C. §§ 1954, 1014: 10/5/78 Indictment; 5/4/79 Conviction (jury); 7/19/79 Sentenced; 3/2/81 Conviction Affirmed, 3rd Cir. Ct. of Appeals.

Vito Cariello, former Secretary-Treasurer, IBT Local 945 and Trustee of Welfare Fund and Severence Fund, West Paterson; 18 U.S.C. §§ 1962, 1954: 10/5/78 Indictment; 5/4/79 Conviction (jury); 7/19/79 Sentenced; 3/9/81 Conviction Affirmed, 3rd Cir. Ct. of Appeals.

Flen Chestnut, Business Representative, IBT Local 945; 18 U.S.C. §§ 1962, 1954: 10/5/78 Indictment; 5/4/79 (Convicted (jury)); 7/19/79 Sentenced; Conviction was reversed, insufficient evidence.

Frank Smith, former Business Representative, IBT Local 945: 10/5/78 Indictment; 5/4/79 Convicted (jury); 7/19/79 Sentenced; 3/2/81 Conviction Affirmed, 3rd Cir. Ct. of Appeals.

Alfred Pascarello, Sr., former President, IBT Local 418, Garfield; Racketeering, bribery and filing false tax returns: 5/11/78 Indictment; 6/8/78 Guilty plea; 7/25/78 Sentenced.

David Friedland and Jacob Friedland, Attorneys for Teamsters, IBT Locals 560 and 701, Pension and Welfare Funds; 18 U.S.C. 371, 1503, 1952, 1954 and 2; 26 U.S.C. 7206(1): 10/22/79 Indicted; 4/11/80 Convicted.

Joseph P. Uzzolino, President, IBT Local 478, Trustee, Pension and Welfare Funds, Union, N.J.; 18 U.S.C. 371: 6/3/80 Convicted; Conviction later vacated, Appeal Pending.

Joseph A. Uzzolino, Business Agent, Local 478, Union, N.J.; Trustee of Local 478, Pension and Welfare Funds.

Joseph Amendola, Trustee of Local 478; 18 U.S.C. 371, 1954, 2: Indictment 11/7/79.

Thomas Andretta, Business Agent, IBT Local 560: Convicted 7-10-79, RICO, 18 USC 1962 (c) and (d).

Anthony Provenzano, former Secretary-Treasurer, IBT Local 560: Convicted 7-10-79, RICO, 18 USC 1962 (c) and (d); Aff'd on Appeal, 620 F.2d 985 (1980); Cert. denied 10-14-80.

Nunzio Provenzano, President, IBT Local 560, Union City, N.J.; 18 U.S.C. 1962(c) and (d): 5/1/81 Conviction; On Appeal.

Salvatore "Sammy" Provenzano, Vice President, IBT, Local 560, Union City, N.J.; President, IBT Joint Council 73, Union City, N.J.; Secretary of the Eastern Conf. of Teamsters and Sixth International Vice President; 18 U.S.C. 1962(c) and (d): 9/4/80 Indictment; 5/1/81 Acquitted.

Michael Sciarra, Business Agent, IBT, Local 560, Union City, N.J.; 18 U.S.C. 1962(c) and (d): 9/4/80 Indictment; 5/1/81 Acquitted.

Stephen Andretta, Business Agent, Local 560; 18 USC 1962(c), (d): Convicted 7-10-79.

EASTERN DISTRICT OF NEW YORK

John Cody, President, IBT Local 282: Indicted, 18 USC 1962(c), 1-12-82.

George Snyder, Secretary-Treasurer, IBT Local 806; Chairman of Trustees of both Pension and Welfare Funds; 18 U.S.C. 664: 5/22/80 Convicted; 1/15/82 Aff'd U.S. Ct. of Appeals, 2nd Circuit; On Appeal, Supreme Court.

Erasmus Manza, Trustee and Business Agent, IBT Local 138; 18 U.S.C. 1951 and 29 U.S.C. 186: 11/12/80 Conviction.

Thomas Vilardo, Secretary-Treasurer, IBT Local 138; 18 U.S.C. 1951 and 29 U.S.C. 186: 11/12/80 Conviction.

Harry Gross, Business Agent, IBT Local 282; RICO, 18 U.S.C. 1962, Taft Hartley, 29 U.S.C. 186, Hobbs Act (Extortion), 18 U.S.C. 1951: 5/21/81 Indicted; Trial date pending.

Joseph Matranga, former President, IBT Local 29, Administrator, Welfare & Pension Funds, IBT Local 816: 3/17/81 Indicted, 18 USC 1962, RICO.

Amadio Petito, Secretary-Treasurer, IBT Local 29: 3/17/81 Indicted, 18 USC 1962, RICO.

SOUTHERN DISTRICT OF NEW YORK

Alvin Adler, Insurance Broker, Employee Benefit Funds, IBT Local 813 and 1034: Guilty plea, 18 USC 1341, July 25, 1979.

Theodore G. Daley, Secretary-Treasurer, IBT Local 445, Newburgh, N.J.; 18 U.S.C. § 1951 and 29 U.S.C. 186(b)(1): 3/20/78 Conviction final.

Anthony "Tony Pro" Provenzano, former Secretary-Treasurer, IBT Local 560; 18 U.S.C. § 371, Conspiracy to violate 18 U.S.C. § 1954: Conviction, Aff'd, 616 F2d 37 (1980); Cert. denied 5-19-80; Conviction, 29 USC 186(a); Aff'd 620 F2d 985 (1980; Cert. denied 10-14-80; 3/25/78 Conviction, 18 U.S.C. § 1201; 6/22/76 Indictment; 10/29/76 Dismissed; 6/14/78 Conviction for New York State murder; 6/21/78 Sentenced to life; 6/79 Conviction reversed on Appeal; Conviction reinstated on subsequent Appeal.

NORTHERN DISTRICT OF NEW YORK

Angela N. DeBella, former employee, New York State Teamsters Council, Health and Hospital Fund (Utica, New York); 18 U.S.C. §§ 371, 664: 6/1/79 Indictment; 11/16/79 Conviction.

William H. Mosley, Former Administrator and trustee, New York State Teamsters Conference Pension and Retirement Funds and New York State Teamster Council Health and Hospital Fund; 18 U.S.C. 664, 1027, 1954; 29 U.S.C. 7206(1): 1/24/80 Indicted; 1/21/81 Pled nolo contendere.

Brian D. Greco, former employee, New York State Teamster Council Health and Hospital Fund, Utica; 18 U.S.C. §§ 371, 664: 6/1/79 Indictment.

NORTHERN DISTRICT OF OHIO (CLEVELAND)

John J. Felice, Jr., former Secretary-Treasurer, IBT Local 293; former Vice President, IBT Local 73: 18 U.S.C. § 664, Embezzlement; 18 U.S.C. § 1962, Conducting Affairs of Local 293 through a pattern of racketeering activity; 4/26/78 Indictment; 11/15/78 Conviction (jury); 12/15/78 Sentenced/Conviction; 11/14/79 Affirmed in 6th Cir. Ct. of Appeals.

Cindy Paige Presser, former Assistant Bookkeeper, IBT Joint Council 41: 29 U.S.C. § 501, Embezzlement; 12/13/78 Pled Guilty; 1/17/79 Sentenced.

James D. Kirk, former Recording Secretary, IBT Local 413: False statements to Grand Jury; 4/25/77 Conviction.

Mary Faulds Shane, former Administrator, IBT Local 436, Welfare and Pension Funds; 18 U.S.C. 664: 2/27/80 Indicted; 7/15/80 Convicted; 11/12/80 Sentenced.

SOUTHERN DISTRICT OF OHIO

Vito Mango, former President, IBT Local 413, Columbus, Ohio: 18 U.S.C. § 1962, Conducting Union Affairs through a pattern of racketeering; 6/21/77 Conviction affirmed.

EASTERN DISTRICT OF PENNSYLVANIA

Francis J. Sheeran, President, IBT Local 326 (Wilmington, Delaware): 18 U.S.C. 1962, 18 U.S.C. 1952 (murder, arson, embezzlement); 9/24/79 Indicted; Acquitted; 7/14/80 Indicted District of Delaware, 18 U.S.C. 1962, 29 U.S.C. 186, 18 U.S.C. 1341; Conviction, Delaware 10-30-81; On Appeal.

Louis J. Bottone, former President, IBT Local 107, Philadelphia: 18 U.S.C. 1962 (murder); 9/24/79 Indicted; Acquitted.

Gordon Grubb, former Secretary-Treasurer, IBT Local 830, Philadelphia: 18 U.S.C. 1014, Making a False Statement to a federally insured credit union; 3/31/80 Sentenced final; Conviction 12-8-81; Sentenced 2-5-82.

Vincent I. Improto, former President and Present Secretary-Treasurer; 29 U.S.C. 439(b); Conviction 2/1/82.

STATE SUPERIOR COURT, RHODE ISLAND (PROVIDENCE)

Nathan Gregora, former Officer, IBT Local 271: Conspiracy to extort; 12/6/78 Conviction.

Donald Munroe, former Vice President, IBT Local 251, East Providence R.I.: Gen. Laws § 11-23-3, Manslaughter; 11/26/80 Conviction.

EASTERN DISTRICT OF TENNESSEE

Howard G. Tennyson, former President, IBT Local 549, Blountville, Tennessee: 18 U.S.C. 664, embezzlement; 5/27/80 Guilty plea.

Mary Taylor Tennyson, former Office Secretary, IBT Local 549: 18 U.S.C. 664, embezzlement; 5/27/80 Guilty plea.

Betty J. Irvin, former Bookkeeper, IBT Local 549; 18 U.S.C. 664 and 371; 5/27/80.

William "Corky" Ellis, former President, IBT Local 327, Nashville, Trustee, Health & Welfare Fund, Local 327: 18 U.S.C. 371, 1341, 29 U.S.C. 501(c), 439(b); 2/20/79 Conviction.

DISTRICT OF WASHINGTON

Phillip Oberman, Supervisor for Northwest Administration, Administrator for Western Conference of Teamsters Pension Fund: 18 U.S.C. §664, Embezzlement; 3/24/78 Final Conviction.

Chairman **RANGEL**. Could you give me just a general idea how many people have been indicted? How many brought to trial? How many convicted?

Mr. **RYAN**. As I mentioned, Mr. Baron, who was the executive director, was indicted, brought to trial, convicted, and served time in a Federal prison. At least four other individuals who were involved with the fund have been indicted; no one has been tried. And immediately after the hearing, we will provide you with a complete list of the individuals who were indicted and tried.

Chairman **RANGEL**. Can you tell me the outcome of these 31 cases that you have initiated in 1981?

Mr. **RYAN**. The 31 cases are civil cases, Mr. Rangel. Some of them are pending right now in a discovery mode. Some are before Federal District Judges on motions for summary judgment.

Chairman **RANGEL**. Mr. Duncan?

Mr. **DUNCAN**. Thank you, Mr. Chairman.

Following what Mr. Rangel asked you about the 31 cases, how much money is involved in those cases, Mr. Secretary, or either one of you? Who would care to answer?

Mr. **RYAN**. I cannot give you the exact amount involved in the 31 cases. I can tell you, Mr. Duncan, that most of the ERISA cases that are pending right now involve significant amounts of money. Many of them involve reimbursement to the funds in excess of half a million dollars.

Mr. **DUNCAN**. Are the funds collectible, or are some of the companies bankrupt, or out of business?

Mr. **RYAN**. The cases primarily are against individual trustees. Some of them involve single employer pension plans. We have been quite successful in recovering funds. In fact, just 2 weeks ago, we settled a case involving the Unicorn Group, which is an investment group in New York City, totaling close to $3 million.

Mr. **DUNCAN**. You think most of it is collectible. Is that right?

Mr. **RYAN**. Most of it is collectible if there are insurance holdings or individual trustees with significant resources.

Mr. **DUNCAN**. Mr. Secretary, the last time we held hearings was March 24 of 1980. At that time there was some undercurrent going around that they did not want this committee to file a report. You wouldn't know anything about that, of course, but you know why the investigations have not been completed. I know you have only been in your present position for a short time. But do you know why the investigations were never completed?

Secretary DONOVAN. Which are those, Mr. Duncan?

Mr. DUNCAN. Investigation of the Central States Teamsters Union.

Secretary DONOVAN. Go ahead, Tim.

Mr. DUNCAN. It is one of you.

Mr. RYAN. Yes, sir. The investigations which were commenced at the time that ERISA was passed were undertaken under very difficult circumstances. We were not here at that time, but as I understand it, a decision was made within the Department of Labor to cease the investigation and to move into a litigation mode. That decision, as you noted, has been criticized not only by this subcommittee, but also by the GAO.

Mr. DUNCAN. Who made that decision?

Mr. RYAN. It was made by the prior administration. I assume by Secretary Marshall and by the Solicitor at that time, Carin Clauss.

Mr. DUNCAN. Do you know the rationale of why the investigation was discontinued, the reason?

Mr. RYAN. No, I do not, sir.

Mr. DUNCAN. The Teamsters Fund now is under the jurisdiction of the present asset managers. Their term, you indicated, runs out October 2. And if they are reappointed, they will be selected by the present trustees of the fund. Is that correct?

Secretary DONOVAN. If the thrust of your question is, could the trustees select new investment managers——

Mr. DUNCAN. Yes.

Secretary DONOVAN. The answer is yes, they could.

Mr. DUNCAN. Now, doesn't that put the present asset managers under some influence by the present trustees who—whether or not they would be selected?

Secretary DONOVAN. I would think so; yes, sir.

Mr. DUNCAN. You have nothing to do with the selection of the asset managers?

Secretary DONOVAN. We do not.

Mr. DUNCAN. I think that is all I have at this time. Mr. Chairman, I would like to have the option, and ask unanimous consent, to have the option of presenting questions in writing to the Secretary and all other witnesses that will testify today.

Chairman RANGEL. Without objection.

Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman.

I want to make sure that I understand exactly why you feel that you have to have this legislation at this time. I am not sure that I understand the urgency and I would like for one of you to elaborate on that.

Secretary DONOVAN. Mr. Jenkins, as I said in my opening remarks, this legislation that we are proposing is needed by the Government at this time, both by the Internal Revenue Service and the Department of Labor. The tools to enforce conditions, contained in the determination letters that have been signed by the fund, as they relate to independent asset management, are inadequate. At the present time, the only available remedy is the revocation letter by the IRS, which is, as they describe it, as an atom bomb type of approach, in that it has serious tax consequences to the contributing employers and to the employees.

Mr. JENKINS. To take that action would hinder or could harm a lot of innocent parties.

Secretary DONOVAN. Yes. It triggers a situation where the contributions are not tax deductible, and the benefits are presently taxable to the beneficiaries, and, again, these are innocent people who have no real input into the decisions.

Mr. JENKINS. Let me ask you this: Is there any disagreement between the Department and the fund about the continuation of independent outside asset managers?

Secretary DONOVAN. Yes.

Mr. JENKINS. Is it incorrect that the fund, the trustees, do not want to continue with outside independent asset managers?

Secretary DONOVAN. No; they indicate that they do see that value. But we see the need to have them as a named fiduciary. This is an area that we insist upon, that it be patterned after the agreement in the initial letter. They have indicated they want the services of outside advice. But we need to see, in our view, that they have independent asset managers who are named fiduciaries.

Mr. JENKINS. So that they could be held liable in the event of any mismanagement? What is the disagreement? I don't fully follow that.

Secretary DONOVAN. Well, they become the named fiduciary, and can act independently of the trustees.

Mr. JENKINS. Can they do that now?

Secretary DONOVAN. They can do that now under the letter of agreement; yes. But it expires October 3.

Mr. JENKINS. And the present trustees do not want to continue that beyond October?

Secretary DONOVAN. There are negotiations going on, as I indicated, at this stage. I cannot be hopeful that we will reach an agreement on a consent decree to assure that that would continue.

Mr. JENKINS. Mr. Ryan, I believe you testified that the 31 cases that have been filed this year are all civil in nature.

Mr. RYAN. Yes, sir. They are.

Mr. JENKINS. Have there been any referrals for criminal prosecution during this time?

Secretary DONOVAN. Somewhere in the area of 6 to 10. But we would have to get you more accurate numbers.

Mr. JENKINS. I would assume that many times there is a real question as to whether or not you have sufficient evidence to proceed on the criminal side, and that determination has to be made after considerable study and before you proceed. So many times you do not know whether or not there will be a criminal indictment.

Secretary DONOVAN. That is a fact. But, in addition, Congressman Jenkins, it is also a matter of policy and attitude. As I implied earlier, the major thrust has been in the civil area. Since we have come to office, we see a need for some balancing between civil and criminal. We have trained, and will continue to train, our investigators in the criminal area. It is a matter of where your priorities are. And I think—I don't think—I know by our study that in the early stages of ERISA, the high priority was civil, almost to the exclusion of criminal.

And there needs to be more balance brought to it. And I would ask Jeff Clayton, if he would, to add some more specifics to that.

Mr. CLAYTON. Well, specifically we have made a commitment to refer more and better criminal referrals to Justice for prosecution. In the past, as Secretary Donovan stated, there was almost no emphasis on the criminal. We are in the process now of providing training in the criminal area. We have planned, in coordination with Justice, a meeting at the end of August, dealing with criminal investigations and referrals, so that our investigators are more sensitive to that type of area.

In addition, we are conducting negotiations with Justice so that we can set up, in essence, a referral tracking system. In the past, when a referral had been made to Justice, no one would really know what happened to that referral. Therefore, we have had three or four meetings with Justice to date, to set up a system whereby not only can we get the referral over to Justice, but we can get feedback to determine whether or not the referral is being acted on, and whether or not the information we are referring is of the type and complete enough that Justice can proceed.

We are also working on changing our own management policies and procedures so investigators in the field can get credit, in essence, for generating criminal referrals. In the past, there was no incentive for an investigator, for example, to generate a criminal referral because the management system would give him no credit.

We are now implementing and designing the necessary changes so that we can meet the commitment to give better and more criminal referrals to Justice, and know what Justice is doing with those referrals, both on a national level and on an area level; we are also making changes so that there is better communication with the local offices, with the U.S. attorney, and with the FBI as the case may be appropriate.

Mr. JENKINS. I think my time is up, Mr. Chairman. Thank you.

Chairman RANGEL. Mr. Pickle.

Mr. PICKLE. Thank you, Mr. Chairman.

Mr. Secretary, is the Department of Labor and/or Justice, IRS, able to go on the Teamsters' premises now and examine their books, and to look at the various asset forms?

Secretary DONOVAN. Yes, we can go on the premises, and we are on the premises right now.

Mr. PICKLE. How long have you had access to the fund and to those records?

Secretary DONOVAN. There was a time when we were not on and did not have the access, but we are on now, and getting general cooperation. There are areas where——

Mr. PICKLE. Have you been on the premises now for 3 months, 6 months, a year? How long?

Secretary DONOVAN. Since April 1980, Mr. Pickle.

Mr. PICKLE. 1980?

Secretary DONOVAN. Yes.

Mr. PICKLE. And you have been on the premises, then, for 2 years approximately?

Secretary DONOVAN. That is correct.

Mr. PICKLE. Have you got any statement to make about what you have found since you have been on the premises? Have you looked in the books? Have you got anything to report about those investigations?

Secretary DONOVAN. We continue to gather data. I mentioned 2 million documents in my opening statement. There are difficulties because of the litigation. The fund on occasion takes the position that some papers are not available to us. I believe on a lawyer-client relationship——

Mr. PICKLE. Has it been helpful to you, the Department of Labor, to be able to go on the premises? Have you found anything worthwhile, or do you feel you have just been searching for the past 2 years without much result?

Secretary DONOVAN. We continue to find things that are worthwhile, yes, Mr. Pickle.

Mr. PICKLE. I am glad that they at least——

Secretary DONOVAN. Two lawsuits have been developed as a result of the access and from——

Mr. PICKLE. And since that time, during the past 2 years or 18 months since you have been in the office, you have pursued vigorously the policy of trying to bring this matter to a head. You testified a minute ago that you have a very vigorous campaign underway to bring this to a conclusion.

I notice in this morning's paper that the Post quotes a Mr. Lehr, the new director of the fund, that he is satisfied with the negotiations at this point. Are you satisfied with the negotiations with the Teamsters at this point?

Secretary DONOVAN. On the consent decree?

Mr. PICKLE. Yes.

Secretary DONOVAN. We remain hopeful. We continue to meet. There are, as I pointed out, some major stumbling blocks, but we will continue to meet.

Mr. PICKLE. You are not satisfied, then?

Secretary DONOVAN. I had hoped, Mr. Pickle, that we could have had this accomplished by now, because October 3 is rushing upon us. We have met over 30 times. We are tough but fair, and there are some hurdles, and in these negotiations new hurdles seem to always pop up.

Mr. PICKLE. When you came into office, you and the Treasury, Justice, met and you announced publicly that you were going to have a very vigorous campaign to bring this matter to a conclusion. That has been approximately 18 months ago. Why have you waited until now, 3 months before this deadline, to ask us for this remedial legislation? Have you felt that you could have worked it out up to now?

Secretary DONOVAN. We have been meeting—if I am incorrect, I would ask Tim and Jeff to correct me—for approximately a year in these negotiations. We have made some significant progress, but it seems when we take a step forward we take a half a step backward, so it has been tedious and difficult. I still am hopeful that we can do it, but the date is closing in upon us.

Mr. PICKLE. What will happen, Mr. Secretary, if we do not pass this legislation, and your management of the independent assets management process goes out of being? What will happen then after October 3?

Secretary Donovan. I would say the obvious thing is that the 500,000 beneficiaries will not have that protection that we think they need. What will happen in a legal sense——

Mr. Pickle. Would you then ask for the cancellation of the qualification of the plan?

Secretary Donovan. I wouldn't want to predict that. I am certain I would leave that to Internal Revenue.

I would hate to see it go that route, because of the very thing that we addressed with you this morning. That would have dire consequences on innocent people as far as the tax treatment, both to employers and the recipients, and I don't think any of us want that.

Mr. Pickle. If the plan is not renewed, would that have any effect on the pending lawsuits between, say, Roy Williams, the president of the fund, and the others who have been indicted? Would the failure to renew this plan, or give the legislation that you have asked for, have any effect on the pending lawsuit?

Secretary Donovan. With Mr. Williams?

Mr. Pickle. Yes.

Secretary Donovan. His criminal case, you are referring to? I am not an attorney, but I could see no effect there. I can't see any.

Mr. Pickle. Why is it that you are asking for this legislation when the fund has said, they have agreed, both in writing once and orally, that they would like to have the asset managers continued, and you have agreed that this is what you want. State again for me the reason. Is it because they want control over the investment policies? Is that the main reason why you won't agree to this?

Secretary Donovan. Yes, in simple terms, yes.

Mr. Pickle. Is there any other factor why you would not agree to it?

Secretary Donovan. That is a major one, and out of it flows all of the protections that we talked about. I just want to be clear that everybody understands that when we both talk about an independent asset manager, that the key words here are a named fiduciary, with the rights and the powers and the responsibility as exist now with Equitable and Palmieri.

I don't believe the fund—when they say outside managers, at least presently—is talking about a professional asset manager. We are going far beyond that.

Mr. Pickle. Apparently they have asked that they would have control over the assets as well as some voice in the investment policy; is that correct?

Secretary Donovan. The trustees, you are speaking of?

Mr. Pickle. Yes.

Secretary Donovan. That is correct; yes.

Mr. Pickle. And because of that, you won't agree, and you said, therefore, we ought to ask for this legislation. You said, "We believe that the continuation of this policy is wise and warranted under the circumstances." Now, what circumstances are you referring to, Mr. Secretary?

Secretary Donovan. Would you repeat that? I am sorry, Mr. Pickle.

Mr. Pickle. Page 10, you point out the basis of Equitable-Palmieri arrangements, that is, to have control and to run investment policy, and you say, "* * * and we believe that the continuation of this policy is wise and warranted under the circumstances." Now, what circumstances are you referring to?

Secretary **Donovan**. When I say "under the circumstances," I believe that they have willingly agreed in the letter with the IRS to these very conditions, and I understand their desire to become independent someday, but we believe that under the present set of circumstances—and there are suits against the present trustees—here are several reasons why we believe that this is necessary in the interests of the contributors and the beneficiaries of the plan. We think it is——

Mr. **Pickle**. Mr. Secretary, this is what concerns me. I was one of the members of the committee who some 7 years ago started this investigation, and in 7 years hardly anyone in Government has laid a glove on this Central States Teamsters Fund. We have had a few suits, some indictments. Nobody has been put in prison. Maybe you can find somebody, but the question still hovers over us, Have you made any progress?

Well, I am personally hopeful, that under the new arrangement, under the new director of the fund, that they are willing to cooperate, and are willing to at least let you come on the premises and bring us some conclusion. It bothers me, though, that here at the end of July you are asking for a new remedy, actually sort of an excise tax on the fund, if they don't comply with this letter of determination.

After 7 years, it seems to me like this is another request to continue this same waltzing that has been going on. The two parties, the Government and the Teamsters fund, have been waltzing with each other while Congress has been listening to the music and it hasn't been very good music. Yet now you want us to play another tune.

I am concerned about what will happen to the fund after October 1 because obviously if you have independent managers you can't let somebody else have control of the assets or control of the investment policy, so it disturbs me very much. If this remedy is given to you, that is, this tax, I am trying to satisfy myself that it would serve a purpose, that is, that we would have some culmination to this controversy that has been swirling over us and around us now for 7 years.

If you got the remedy, this extra legislation, can you tell me when and how soon do you think you could reach an agreement? That is my first question. Can you tell me when? Can you give me an estimate of when you hope you might be able to work out a consent agreement with these parties?

Secretary **Donovan**. Well, Mr. Pickle, it may be that we will agree to a consent decree agreement before October 3, but I want to stress, as I did in my testimony, that even if we do, this legislation in our view is needed. The Central States is an example that brought this gap in the ERISA enforcement law to our attention.

It is needed by the Government far beyond the Central States situation, so that rather than a targeted piece of legislation, this is a broad piece of legislation, which we think would give us an added tool that is necessary, so there would be less waltzing, to use your word, in the future.

Mr. Pickle. I thank you. My time has expired.

Chairman Rangel. Mr. Shannon.

Mr. Shannon. Thank you, Mr. Chairman.

Mr. Secretary, as I understand it, the fund has indicated its willingness to have independent asset managers if certain conditions are met by the Government prior to October 3. Could you tell me what those conditions are, specifically?

Secretary Donovan. Yes, we can get into most of them. But, again, I hope we are not misunderstanding what independent asset managers are. In the newspaper this morning they called for professional asset management. That is not what we are discussing here, and I just wanted to be sure that was clear.

Yes, there are other conditions that would arise naturally in any long, tough negotiation. One is the desire of the fund to see some of these old cases settled.

Mr. Shannon. Are we talking about all of the cases, the 31 pending cases?

Secretary Donovan. At this point that is not clear that it is all, but it may end up to be that that would be one of the conditions. But to be more specific and to be more timely, I would ask Solicitor Ryan to recite at least what is on the table right now.

Mr. Ryan. Mr. Shannon, the 31 cases we mentioned were new cases brought during the last fiscal year against all defendants, not necessarily against Central States Pension Fund.

Mr. Shannon. How many cases are there total in this episode? You had 31 the last fiscal year. How many are hanging from previous fiscal years?

Mr. Ryan. In total, there is a case against the pension fund, *Donovan* v. *Fitzsimmons,* which is a case that has been around for about 4 years. Another case against the Health and Welfare Fund which is captioned *Donovan* v. *Robbins.* There is a case, a new case, which involves the Health and Welfare Fund and which has been brought against the former trustees.

Those two cases I just mentioned were against the former trustees, which is in the Northern District of Florida. That is *Donovan* v. *Nellis.*

There is another case initially brought by the trustees against the Department, *McDougall* v. *Donovan.* We have responded. We have also intervened in two other cases, so there is a total of six cases that involve Central States that the Department of Labor is involved in.

Mr. Shannon. Plus the 31?

Mr. Ryan. Excuse me?

Mr. Shannon. Plus the 31?

Mr. Ryan. No, sir. The 31 cases are cases involving ERISA enforcement.

Mr. Shannon. Total ERISA enforcement?

Mr. Ryan. Total ERISA enforcement.

Mr. Shannon. So are all of the cases involving the Central States Pension Fund on the table as part of a negotiation? Let me ask you more specifically, either the Solicitor or the Secretary perhaps can answer this question. Is one of the conditions precedent to the fund's agreement to have independent asset managers the resolution of all of the cases pending against the fund by the Department of Labor or now?

Mr. RYAN. That is their intent. One of the problems that exists here is that the fund with whom we have been negotiating does not represent the defendant trustees in the *Fitzsimmons* and *Robbins* cases. They involve the old trustees, not the present trustees.

Mr. SHANNON. Are the old trustees involved in these negotiations at all?

Mr. RYAN. Generally, no.

Mr. SHANNON. What do you mean by "Generally, no"?

Mr. RYAN. The negotiations not only involve the Department of Labor, IRS, and the fund, but also take place in the Federal District Court in Chicago in Judge Moran's chambers, and there multiple parties are present including counsel for the old trustees.

Mr. SHANNON. The negotiations going on with the fund now, negotiations which will have to be concluded by October 3, is part of that negotiation, any demand being made by the present trustees that the cases against the previous trustees be resolved?

Mr. RYAN. In the past the position of the trustees was that the *Fitzsimmons* case should be settled. As the Secretary stated in his testimony, our response to that was that we could not settle the *Fitzsimmons* case because we could not come to a dollar amount settlement, because we did not know what the old trustees were worth.

The Government now has access to financial statements and other information, and we have told the trustees that we will not settle the *Fitzsimmons* case unless there is substantial contribution by the individual defendant trustees.

That, quite frankly, has put the Fitzsimmons settlement on a hold. The trustees have taken the position, the new trustees and the fund, that they would negotiate with us absent a settlement of the Fitzsimmons——

Mr. SHANNON. They would?

Mr. RYAN [continuing]. Contribution.

Mr. SHANNON. Would or would not?

Mr. RYAN. That they would.

Mr. SHANNON. And so they are willing to settle and let the other case hang?

Mr. RYAN. Right now they would like us to sign a consent decree which would have the type relief that the Secretary has talked about, and that would settle the *Nellis* case in Florida and the *McDougall* case, which is the airplane which they own.

Mr. SHANNON. Let me ask, in the course of these negotiations has the Justice Department been involved?

Mr. RYAN. Justice Department is not a direct representative in the negotiations. Prior to every meeting with the fund, we have a litigation task force working group meeting, which includes the Justice Department.

Mr. SHANNON. And is the resolution of any of the criminal cases that are pending involved at all in the negotiations that you are having?

Mr. RYAN. No, sir.

Mr. SHANNON. There is no discussion of any——

Mr. RYAN. No discussion of the criminal cases.

Mr. SHANNON. No kind of indication required as to whether there is an intent on the part of the Justice Department to bring further prosecutions?

Mr. RYAN. There is no discussion of the criminal cases, criminal indictments or any grand jury activities, sir.

Mr. SHANNON. Mr. Secretary, have you had any discussions with the Attorney General about resolving any of these criminal cases?

Secretary DONOVAN. I have not.

Mr. SHANNON. You have not. Has the Attorney General directly been involved in following any of the negotiations between the pension fund and the Department of Labor on any of the civil cases?

Secretary DONOVAN. As you are aware, we set up this task force.

Mr. SHANNON. Yes, I am aware of the task force, but I am talking about directly, the Attorney General directly involved in any of this.

Secretary DONOVAN. No, he has not.

Mr. SHANNON. Other than through his own channels, you haven't kept him personally apprised as to any of the negotiations that are taking place?

Secretary DONOVAN. Well, his people are informed.

Mr. SHANNON. Yes, I understand that, but you haven't had any discussions at that level with him?

Secretary DONOVAN. Not at this stage; no.

Mr. SHANNON. Of this area. Thank you.

Mr. PICKLE. Would the gentleman yield?

Mr. SHANNON. I would be happy to yield.

Mr. PICKLE. Mr. Secretary, if you haven't had any discussions with the Justice Department with respect to the criminal cases, I am wondering what do you all talk about when you meet as a task force, as you have for the past 18 months? Do you just say, "Please don't bring up the criminal discussions"? Do you just say, "I don't want to hear anything about that"?

How can you meet? Have you as a task force met many times in the last 18 months?

Secretary DONOVAN. You have to differentiate between the Attorney General, Treasury Secretary Regan, and myself. We have established a high priority working group, and this is the group that does the meeting and the negotiating.

Mr. PICKLE. So you have not as a trio been meeting, but rather representatives of your departments have been meeting?

Secretary DONOVAN. We have met several times to monitor what progress is being made. Mr. Ryan, I think, can add some comments on the task force itself.

Mr. PICKLE. Basically, then, you each have left to your subordinates the negotiations for some kind of a settlement?

Secretary DONOVAN. Yes, and we think that is proper at this stage.

Mr. PICKLE. One other question. There is a lawsuit pending now against Roy Williams to be started presumably in some 45 days. Is it your feeling that that lawsuit should be pursued and vigorously prosecuted?

Secretary DONOVAN. It is a Justice Department matter, and it is in their hands, and I believe it is being vigorously pursued.

Mr. Pickle. And you know nothing about the possibility of any action in the Roy Williams case that is pending now?

Secretary Donovan. That is correct.

Chairman Rangel. If the gentleman would yield, to conclude then, this task force that has been set up to oversee the Central States Pension Fund does not discuss criminal matters as may relate to the Teamsters?

Secretary Donovan. I will have Mr. Ryan address that for you, Mr. Chairman.

Chairman Rangel. Mr. Secretary, do you have a problem answering that?

Secretary Donovan. It is a legal area. No, I don't have a personal problem, but it is a legal area that I want my attorney to answer.

Chairman Rangel. OK.

Secretary Donovan. Why would I have a problem? Why would you think I would have a problem answering that?

Chairman Rangel. Because you are part of the task force, and all I am asking is the scope of the investigation and oversight activities, and whether or not you, as the Secretary of Labor, and members of the task force discuss or can discuss matters that would be before the grand jury, matters that are going to trial.

You see, I am a lawyer, and if I am trying to negotiate a civil case with any person that has a matter before the Department of Justice, then it is very important to me to know the status of the criminal case. So I thought it was a very simple question that you didn't need a legal background to answer. That is the only reason, Mr. Secretary, that I raised the question, the only reason.

Secretary Donovan. I am aware of these areas, and I would ask my attorney to reply.

Mr. Ryan. During the working group meetings which normally includes the director of the Organized Crime Strike Force, on periodic basis the head of the Criminal Division and the associate head who handles not only the Criminal Division but also the FBI, we discuss the ongoing criminal matters which does not involve grand jury-type information.

As you well know, Mr. Rangel, because you are an attorney and have been a prosecutor, we are precluded by Federal law from discussing material that is covered by rule 6(e),which is criminal information derived and discussed in matters before a Federal grand jury. So we have to be very careful in how we mix the civil and criminal enforcement activities.

But to answer your question directly, yes, we do talk about criminal information where it is appropriate, and we do cooperate——

Chairman Rangel. I would assume you would. You do refer cases to Justice?

Mr. Ryan. Yes, sir.

Chairman Rangel. Mr. Martin.

Mr. Martin. Thank you, Mr. Chairman.

Mr. Secretary, let me begin with a preliminary, somewhat unrelated, question. It pertains to the paragraph that continues to the top of page 3, where you are discussing the growth of assets, of pension funds, and presumably the participants in pension funds. At a hearing some years ago we were given information that showed that pension funds were being closed at a rate of about 1,000 a month.

And at that time the testimony seemed based on the difficulty of compliance with ERISA, partly because of the dual jurisdiction of IRS and Labor, and for other reasons as well. It may be that you wouldn't have the precise figures with you, but, if not, I would appreciate your providing us with information as to what the current status of that trend would be.

Are we increasing the number of pension plans, or are we still closing them down at a rate of about 1,000 a month or somewhat less or what?

Secretary DONOVAN. You are absolutely correct, that at the birth of ERISA there was a dramatic fall-off, and I am sure that disappointed the Congress and the executive branch. There were a lot of reasons for that which I think is apparent to all of us, the fear of the law, its confusion, the paperwork, et cetera. I think that that trend has been slowed, but I would ask Jeff Clayton, who probably has some current figures or near current figures to give you.

Mr. CLAYTON. I can't give you the actual number, but I have seen the preliminary numbers from a study indicating that plan formation is about back up to the pre-ERISA levels. It has rebounded.

Mr. MARTIN. By that you mean that you form more plans than you are closing?

Mr. CLAYTON. That is right.

Mr. MARTIN. Not you but the country.

Mr. CLAYTON. That is correct.

There was a large dropoff right after ERISA was enacted. That continued. It has turned around and we are back up to pre-ERISA levels now.

Mr. MARTIN. When those particular numbers are available, I would appreciate if you would provide them to the committee and to the——

Mr. CLAYTON. We would be happy to, Representative Martin.

Mr. MARTIN. The principal issue of the legislation that you are requesting, Mr. Secretary, is to require that when a plan accepts in writing conditions in a qualification letter from the IRS, then any violation of those conditions that they agreed upon would be, per se, a prohibited transaction; is that correct?

Secretary DONOVAN. Yes; to make the action a per se prohibited transaction, Congressman.

Mr. MARTIN. And that is your principal objective in these hearings, is to try to get such legislation moving?

Secretary DONOVAN. Yes. In addition, it enables the Labor Department to go immediately to court for injunction to be sure that the violation does not continue. It is those two parts.

Mr. MARTIN. As a part of the enforcement process?

Secretary DONOVAN. Yes, sir.

Mr. MARTIN. Your principal interest, as you have indicated, is with the Central States Pension Fund, but it would apply to any other pension fund as well?

Secretary DONOVAN. Yes. As I said, the Central States brought the need or this gap, as I would call it, in our enforcement toolbox to our attention, but we believe strongly that it is needed legislation in our enforcement area for all other plans.

Mr. MARTIN. With regard to the Central States Pension Fund and the letter, the qualification letter which it has accepted, which it has agreed to with IRS, one of the conditions is the independent asset management; is that correct?

Secretary DONOVAN. That is correct.

Mr. MARTIN. Is that the principal condition that concerns you? On page 9 you also mention matters related to that particular contract; that is, the wish to terminate the contract without cause, which you object to, and the question of whether or not the managers should have control of investment policy as well as the assets. Are these particulars in the IRS letter?

Secretary DONOVAN. Yes, they are, and they are all interconnected, all linked, Congressman.

Mr. MARTIN. And so those particulars are matters which the Central States Pension Fund has agreed to in writing?

Secretary DONOVAN. That is correct, yes.

Mr. MARTIN. That brings me back to the question that Mr. Pickle was asking you about the likely consequences if we fail to enact the legislation which has been requested. Of course, one of the immediate consequences would be that the agreement, the contract between Central States Fund and the present managers would expire.

That would, of course, be one consequence. Is that likely to be renewed? Or will it be renewed only with these conditions which you mention on page 10, which Central States wants to change but which they had agreed to in the letter with IRS, namely, they would not be able to terminate the contract without cause?

Would that be a part of a further contract, or do you believe that point would be lost?

Secretary DONOVAN. If we didn't get this legislation, you mean?

Mr. MARTIN. If you don't get the legislation and the contract expires. Then if Equitable and Palmieri and Central States do work up a second contract, a follow-on contract, an extension, would it be apt to have a provision that would terminate the contract without cause?

Secretary DONOVAN. Yes, as I understand it, that would be the plan.

Mr. MARTIN. Even though they have agreed with the IRS in their letter, their qualification letter, and they have agreed on that point, they would still, in your opinion, they would still seek to get a provision that would allow them to terminate the contract without cause?

Secretary DONOVAN. That is correct, the letter will have expired.

Mr. MARTIN. And that is one of your concerns?

Secretary DONOVAN. That is one of our major concerns.

Mr. MARTIN. The letter will have expired also, the qualification letter with IRS?

Secretary DONOVAN. Just the agreement.

Mr. MARTIN. Right. The qualification letter would still——

Secretary DONOVAN. Yes.

Mr. MARTIN. Exist, and it would still include the agreement, the written agreement of the Central States Fund on this particular point, but you believe the new contract would provide otherwise; that is your concern?

Secretary **Donovan**. That is correct. Mr. Ryan would like to add something to that, Mr. Martin.

Mr. **Ryan**. Mr. Martin, one of the primary reasons for the request for this legislation is to Central States, but the Secretary has already said that it would be an important tool in the future for prospective enforcement relief, but as to Central States, the legislation would fill that enforcement gap.

If the present agreement expires on October 3, and the fund decides to, let's say, manage their own funds in violation of the conditions in the qualification letter, at present the only available remedy to the Government would be for the IRS to revoke that letter.

And as the Secretary has said, we think that that punish the innocent, and does not deal with the culpable parties at all. This legislative request on which we hope you will look with favor would fill that enforcement gap.

Chairman **Rangel**. Are there any other questions?

Mr. **Martin**. Yes. Mr. Chairman, do we have time remaining?

Chairman **Rangel**. If you are requesting the time; yes.

Mr. **Martin**. May I proceed?

Chairman **Rangel**. Sure.

Mr. **Martin**. Thank you, Mr. Chairman.

One of the possible consequences that Mr. Ryan has just touched on, Mr. Secretary, is the possibility of the qualification letter from the IRS being revoked by the IRS.

They could revoke it if any of those points in the agreement are violated, if they choose to revoke it. It wouldn't be a mandatory revocation; is that correct? Would they be obliged to revoke it if any of those conditions are——

Secretary **Donovan**. As I understand it, they follow us in order here in testifying, and I would think that that may be more properly asked of them.

Mr. **Martin**. If they were to revoke it, either because it is mandatory, or, because they choose to do so, who would win? You have indicated that you wouldn't win, and you have indicated that the beneficiaries of the pension fund would not win.

Regarding the old trustees or the new trustees, would this interfere with your ability to pursue the six cases that Mr. Ryan has mentioned? Who has an advantage if we don't enact this legislation, and, if the qualification letter is revoked? Who stands to gain from that?

Secretary **Donovan**. I don't think anybody wins in the end under those conditions. It would possibly free up the trustees from any agreement that we have in the way of control of the assets. I don't know that that would be viewed as a win, because I am not sure that that is their intention.

Mr. **Martin**. They will also have a representative testifying, so we can pursue that with them?

Secretary **Donovan**. Yes.

Mr. **Martin**. But in your view, no one would gain, not the new trustees, not the old trustees; they would not be advantaged if we failed to enact the legislation request, and if, as a consequence, IRS revoked the qualification letter?

Secretary **Donovan**. That is our belief, that it would be to no one's advantage.

Mr. **Martin**. Thank you very much, Mr. Secretary. Thank you, Mr. Chairman, for your patience.

Chairman **Rangel**. Mr. Moore, I will pass over you until I see whether other members have questions. Maybe you will be in a better position to respond. Mr. Pickle.

Mr. **Pickle**. Mr. Secretary, in four administrations we have seen very little, if any, action on the Central States Teamsters Fund, other than having set up the independent asset management. There have been practically no convictions, and you are asking now for additional legislation that would allow a tax, in the event they agreed to the plan, and then didn't carry it out.

I repeat again to you that there are many people who are beginning to think that the Teamsters lawyers—and there are myriads of them——

Secretary **Donovan**. We know that.

Mr. **Pickle**. Can literally just wear you out, that they take you from one action to another, that there is not a determination in the Government to see this question brought to a head. I don't fault any one group or any one administration, but now in the course of four administrations this question is still much like it was 7 years ago, and one has to stop to think sometime, is it possible to bring the Teamsters under control? Are the Teamsters bigger than the Government? A lot of people ask that question.

I think it is very important, if this legislation is advanced, that because of it, or because primarily of the determination of the administration that we do something about this Teamster question. People have a right to expect some action.

I think the people are becoming not just tired of it. I think they kind of laugh at the Government that you never can get any action. It just hangs out there, so I would ask as we consider this legislation, that something be done, We may take harsh actions, or much harsher than we have talked about, unless some action is brought about.

Secretary **Donovan**. Mr. Pickel, can I say in defense of my people that since taking over these responsibilities, we have placed a high priority on this mater. It is an extremely complicated case, but it has not been lying on the shelf at the Labor Department since we have been here, not to imply anything negative for the past, but we have made a lot of progress. We are here to ask for these additional tools so that the next administration doesn't sit here with you, Congressman, and face these same issues.

Chairman **Rangel**. Mr. Jenkins.

Mr. **Jenkins**. Thank you, Mr. Chairman.

Mr. Secretary, as I understand the position of the Department, what you are primarily concerned about is that the current trustees have not really agreed to a wholly independent continuation of independent investment managers; that they demand certain conditions, which I would assume would be the right to fire or discharge, and that sort of thing?

Secretary **Donovan**. Yes. Well, they haven't agreed to the independent asset manager without other conditions as yet, but, yes, that would be implied, that if we don't get it, they could dismiss the asset managers.

Mr. **Jenkins**. They have not agreed to the continuation of the present setup of independent investment policy and all of the other conditions that now exist; is that correct?

Secretary **Donovan**. They have not.

Mr. **Jenkins**. They have not agreed?

Secretary **Donovan**. That is correct.

Mr. **Jenkins**. I would assume that under existing law the present trustees wouldn't be hurt at all if you take away the tax status. They wouldn't be harmed, would they, under existing civil remedies?

Secretary **Donovan**. They would not, and it would be the innocent parties who would be harmed, and that is one of the major thrusts of the suggested legislation.

Mr. **Jenkins**. So there is no leverage whatsoever over the individual trustees today, and that is one of the reasons you are seeking this legislation?

Secretary **Donovan**. In addition, the ability of the Labor Department to go to court for an injunction to stop the trustees from the action that triggered——

Mr. **Jenkins**. Are the present trustees also attempting to ask that individual liability on previous trustees or current trustees be absolved as a condition of settlement?

Secretary **Donovan**. I wouldn't use the word "absolved." There has been considerable discussion about liability, the personal liability of previous trustees, yes, and we have taken a strong position in that.

Mr. **Jenkins**. Your position, the Department's present position, is that there should be individual liability?

Secretary **Donovan**. Yes.

Mr. **Jenkins**. Thank you.

Secretary **Donovan**. For several reasons, one being the inadequacy, in our view, of the insurance proceeds.

Chairman **Rangel**. Mr. Moore.

Mr. **Moore**. One follow-up question. If a consent decree is signed prior to the date October 31, would you still be advocating this legislation, or is it specifically aimed at the impasse that you have with Central States?

Secretary **Donovan**. Very much so, Mr. Martin.

Mr. **Martin**. Very much so, that is——

Secretary **Donovan**. That we will be seeking this legislation, and hopefully receive it, because we need this additional tool to enforce similar situations. There are 560,000 plans out there. We know of none currently where this would be applied, but it is not illogical to assume that this legislation will be used in the future.

Mr. **Martin**. This legislation, as you indicated earlier, would give you other mechanisms, other remedies than the massive one of revocation of the qualification letter?

Secretary **Donovan**. Yes, and it would speed up—Chairman Rangel, you pointed out, I think, the waltzing and the delays over these many, many years. This will speed the process, I believe.

Mr. **Martin**. Thank you, Mr. Secretary.

Chairman **Rangel**. Mr. Secretary, this committee has always been responsive to the needs of the Department of Labor, especially as it relates to ERISA. I would like to state for the record that Timothy Ryan has made a great contribution toward a better understanding of some of the problems that are faced by the Department of Labor.

I am requesting—and I do hope that the record states that I am so requesting for the committee, since we have to go to the full committee to get support for any legislation—a status report from you. I hope that, within the restrictions of your task force, it might include the status of the criminal cases, if any. I am making the same request of the Attorney General, who I understand is a part of that task force.

Secretary **Donovan**. Yes.

Chairman **Rangel**. I thank you for your appearance before this committee, and I am satisfied if there are any additional questions that members have not asked, that we will, because of the time factor, deal directly with staff.

Secretary **Donovan**. We will be happy to. Thank you so much for your courtesy.

Chairman **Rangel**. The Honorable Roscoe L. Egger, Commissioner of Internal Revenue Service, accompanied by S. Allen Winborne, Assistant Commissioner (Employee Plans and Exempt Organizations). David Glickman, Deputy Assistant Secretary, Department of Treasury, will be with the Commissioner.

Commissioner, you are an old witness to this committee. You can read your statement or have it submitted, whatever you feel would be best for you and the committee.

STATEMENT OF ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE SERVICE, ACCOMPANIED BY S. ALLEN WINBORNE, ASSISTANT COMMISSIONER (EMPLOYEE PLANS AND EXEMPT ORGANIZATIONS); ROBERT WENDEL, CHICAGO DISTRICT OFFICE; AND DAVID GLICKMAN, DEPUTY ASSISTANT SECRETARY (TAX POLICY), DEPARTMENT OF THE TREASURY

Mr. **Egger**. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, we are pleased to be with you today to discuss the need for legislation to create new enforcement powers that the Government can use to enforce determination letter conditions relating to independent asset management, and illustrate the need for such legislation in the case of the Central States Pension Fund.

With us today are S. Allen Winborne, IRS Assistant Commissioner (Employee Plans and Exempt Organizations), and Mr. Robert Wendel, Chief of the Employee Plans-Exempt Organization Division in the Chicago District Office of IRS.

OVERVIEW

Since the Service has not testified before this subcommittee on this subject since March of 1980, I would like to provide some background on the Central States case to keep current events in perspective.

As you know, the Central States Fund is one of the largest pension plans in the entire country, with approximately $3.5 billion in assets, a half million participating employees, and several thousand contributing employers.

BACKGROUND—1. 1976 REVOCATION

In 1976, the Service took action to revoke the fund's tax exemption because the activities of the fund did not satisfy the requirement under the Internal Revenue Code that a tax qualified retirement plan must be operated for the exclusive benefit of employees and their beneficiaries.

The action was based on several findings of fact, such as findings that the terms of loans from the fund's trust were not enforced and that trust assets were disbursed without adequate security.

In addition, the Chicago District found that assets were invested for a rate of return not commensurate with prevailing rates and that assets were invested by the fund without requiring reasonable repayment terms. The district also found defects in the fund's payment of benefits to participating employees, such as the inadequacy of the fund's records to determine the benefits due to participants.

Following the District Director's determination that the Central States Fund was not qualified, the Service, in coordination with the Labor Department, began negotiating with the fund to restore its tax-exempt status. All parties involved recognized that the loss by the fund of its tax exemption would adversely affect the interests of its contributing employers and participating employees, who were not responsible for the fund's failure to satisfy the exclusive benefit requirements under the code.

2. 1977 REQUALIFICATION AND ENTRY INTO 5-YEAR AGREEMENT

After extensive discussions with the fund and the Labor Department, the Service on April 26, 1977, issued a requalification letter restoring the fund's tax exemption, subject to the fund's satisfying eight specific conditions. The most important of these conditions required the fund to turn over all of its assets to qualified, independent asset managers, except for a small percentage of assets needed for benefit payments and administrative expenses.

In November 1977, the fund transferred most of its assets to independent managers under a 5-year agreement with the Equitable Life Assurance Society, appointing Equitable as the fund's named fiduciary exclusively responsible for investing the fund's assets, either directly or through other asset managers, in securities, real estate and other assets. This agreement, which expires on October 3, 1982, was a major step toward reforming the abuses in the investment of the fund's assets.

3. 1979 APPLICATION FOR NEW DETERMINATION LETTER

In September 1979, the fund applied for a new determination letter because of plan amendments adopted as a result of a new collective bargaining agreement between the Teamsters and the trucking industry. The Service did not issue a determination letter in response to this application until 1981 for several reasons.

First, the information initially submitted by the fund in connection with the application was not complete.

Second, any new determination issued by the Service would supersede the requalification letter, and any condition not restated in the new letter would no longer apply to the fund.

Third, the Service did not have current information about the fund's operations because the fund had stopped providing monthly reports required under the requalification letter and also had, in effect, prevented the Service from conducting an examination of the fund's operations on site at the fund's headquarters.

4. 1980 ADMINISTRATIVE SUMMONS FOR RECORD

In view of the fund's failure to voluntarily provide more current information about its operations, in April 1980 the Service issued an administrative summons to begin an examination of the fund. When the fund placed unreasonable restrictions on its offer to comply with the administrative summons, and denied the Service's legal right to conduct the examination, a summons enforcement action was initiated in Federal court.

As a result of an order issued by the court following the initiation of this lawsuit, the Service was able to begin an examination of the fund.

5. 1981 DETERMINATION LETTER ISSUED

On November 11, 1981, the Chicago District Director issued a new determination letter to the fund. The new letter contained several of the same conditions which the Service had imposed in 1977. We continued to believe they were necessary to assure that the fund would be operated for the exclusive benefit of employees. The fund agreed to this new determination letter and its conditions.

Under the most important condition in the new letter, the fund is required to continue to place most of its assets with qualified, independent asset managers. As explained in more detail later, we believe that this condition far outweighs all of the other conditions in the requalification letter in importance.

The new determination letter, like the requalification letter of 1977, permits the fund to retain assets needed for benefits payments and administrative expenses. However, the new letter places more stringent controls on assets retained for these purposes.

The fund is permitted to retain assets only when it actually determines that such assets are necessary for benefits payments and administrative expenses. Also, the letter places an overriding cap on amounts that may be retained equal to 2½ times the average daily balance of amounts expended for such purposes in the prior month. Finally, assets retained by the fund must be managed and invested in accordance with the advice of a qualified investment manager.

The new determination letter retained the condition that the fund continue to improve the data base used to determine the eligibility of participants for pension benefits and comply with benefits information reporting requirements. Also, the letter requires the fund to maintain a qualified internal audit staff.

Several conditions were not restated in the new determination letter. For example, conditions 1, 3, and 5 of the requalification letter of 1977 were not restated because they had been satisfied. These conditions required the fund to adopt amendments to comply with ERISA, to review certain benefit applications that were initially rejected but subsequently approved to assure that benefits were paid in appropriate amounts, and to amend the fund's trust to include a statement of investment policies.

In addition, the Service determined that it would not be appropriate to retain two of the other conditions in the new letter, although the fund had not completed the performance of the actions required by these conditions. Condition 4 of the requalification letter required the fund to review its past loans to determine whether causes of action existed against the fund's former trustees or third parties with respect to the losses resulting from these loans.

After an indepth review of this requirement, the Service determined that the fund's prospects of recovering its loses were limited, and that it would be unreasonably expensive for the fund to pursue these loans.

Condition 7 required the fund to publish its annual financial statements in a newspaper of general circulation in each State. The Service determined that this condition should not be retained because it duplicated the reporting requirements applicable to the fund under the Employee Retirement Income Security Act of 1974 (ERISA).

On March 4, 1981, before the Service had completed its review of the fund's application for a new determination letter, the Secretary of the Treasury, along with the Secretary of Labor and the Attorney General, established a litigation strategy task force to coordinate the Government's investigation of the Central States Pension Fund and Central States Health and Welfare Fund.

As you know, while the Service is responsible for investigating violations of requirements applicable to qualified retirement plans under the Internal Revenue Code, the Labor Department investigates potential violations of the fiduciary requirements established under title I of ERISA. In addition, the Justice Department is responsible for the prosecution of individuals accused of criminal violations involving employee benefit plans.

The designated representatives of these three agencies have met regularly since the creation of the task force to discuss and coordinate various aspects of the Government's investigations of the Central States Fund. For example, the Service coordinated with the task force the conditions in the fund's new determination letter.

Of particular significance in this area are the efforts of the Labor Department to secure the fund's agreement to a comprehensive consent decree addressing all of the Government's concerns about the fund's operations. Unfortunately, these negotiations with the fund have not been successful. The fund has not unconditionally committed itself either to renew the agreement or to enter into a new agreement with safeguards as effective as those in the current agreement. After the expiration of the contract with Equitable, there is a significant likelihood that the fund will terminate its present arrangement, as we will discuss later; it is highly questionable whether any substitute arrangement that does not guarantee independent asset management would be in the interests of the fund's participating employees.

Now that you have some information about the current status of the Central States Fund case, we would like to discuss the general need for legislation creating new enforcement powers which apply in cases where a determination letter has been issued to a multiemployer retirement plan and the determination letter contains a condition relating to independent asset management.

As you know, at the present time, if a plan receives a determination letter containing a condition relating to independent asset management and violates the condition, the only potential remedy available to the Service is to disqualify the plan, and thus increase the income tax liability of the trust of the plan, contributing employers and participating employees. However, in the case of a multiemployer plan, the sanction of disqualification may not be the most effective remedy because the contributing employers and participating employees may not be responsible for the violation of the conditions.

We believe that, if a multiemployer plan has agreed in writing to an independent asset management condition in a determination letter, the Government should have the authority to enforce the condition without resorting to the drastic action of disqualification.

New legislation requested by the administration provides an answer to the problem, by permitting the Government to use the qualification letter mechanism to require the correction of defects in the management of plan assets without incurring the adverse consequences of disqualification of the plan.

Under the proposal, a new sanction would apply in any case where a multiemployer plan has accepted in writing a determination letter condition relating to independent asset management. If the plan should violate the condition, the trustee or plan administrator responsible for the violation would be subject to an excise tax on the amount involved in the violation.

In addition, the Labor Department would have the authority to seek an immediate injunction to prevent the violation.

The experience of the Government in attempting to correct the abuses in the management of the assets of the Central States Fund illustrates the need for improved enforcement powers in cases of this kind. We would like to give you some examples of the actions of the trustees since the requalification of the fund in 1977 that convince us that returning the assets to the direct control of the trustees in October would not be in the interests of the participants of the fund.

In 1979, the trustees attempted to undermine their agreement with Victor Palmieri & Co., one of the fund's independent asset managers, by questioning the reasonableness of the fees that the fund had agreed to pay Palmieri. In that same year, the fund indirectly acquired a $3 million jet aircraft from the Central Conference of Teamsters, which the Labor Department has alleged is a violation of the prohibited transaction requirements under ERISA.

In 1980, the trustees accumulated several times the amount of assets that had previously been retained for benefit payments and administrative expenses for the apparent purpose of improperly settling a lawsuit for $91 million.

The final factor in our concern about the need for an independent asset manager arrangement in this case is the fund's longstanding resistance to the Government's efforts to monitor the fund and obtain the fund's voluntary agreement to a consent decree guaranteeing the long-term reform of its operations.

As I stated previously, the fund stopped providing monthly reports regarding its compliance with the conditions in the qualification letter in 1979. Also, the fund attempted to prevent the Service's examination of the fund's operations until a lawsuit had been filed to enforce the Service's administrative summons.

During the period we have discussed, most of the fund's assets were protected by the existence of the independent asset management agreements. However, after October 3, 1982, the fund will no longer be under a contractual obligation to maintain these assets under an arrangement with the safeguards that characterized the Equitable agreement. At that time, if the trustees of the fund violate the condition in the determination letter issued on November 11, 1981, requiring the continuation of such an arrangement, the only potential sanction available to the Service would be to disqualify the fund.

As we have indicated, the sanction of disqualification would not be effective in preventing the trustees from regaining direct control over the assets because the impact of the sanction would not be felt by those responsible for the violation of the condition.

Under the proposed legislation, the fund would remain subject to the condition, and therefore to the additional sanction, until it is demonstrated that returning the fund's assets to the direct control of the trustees would be in the interests of the fund's participating employees. Moreover, the impact of the sanctions would fall directly on the individuals responsible for the violation.

Treasury and IRS are not alone in believing that the assets should be independently managed. Various Members of Congress have voiced similar concerns. In addition, the General Accounting Office, in a report of the Comptroller General, dated April 28, 1982 ["Investigation to Reform Teamsters' Central States Pension Fund Found Inadequate," HRD-82-13] expressed a number of concerns about the Central States case. We believe that the representatives of the General Accounting Office who are here today will be referencing this report in their formal testimony.

We urge you to take prompt action on this legislation. It is important that the statutory protections be in place by October 3 of this year, to insure that the Central States Fund continues to be managed by an independent asset manager and that similar conditions for other plans are respected and complied with by trustees and administrators.

Mr. Chairman, we want to assure you and the other members that Treasury and the Service view their responsibilities in this area very seriously. We continue to have a great deal of concern for the safety and proper administration of the fund's assets, as well as for the benefits of the employees and their beneficiaries.

The proposed legislation we have just described is clearly the best solution to insuring independent asset management of the assets of the fund or any future multiemployer pension plan that agrees to such a condition in its qualification letter. Without its timely enactment, we will be forced to rely on remedies which in effect punish contributing employers and participating employees, instead of the individuals who would likely be responsible for any violations. We do not believe this is satisfactory, and we ask your help in providing us the tools we need to address this issue properly.

Mr. Glickman, Mr. Winborne, Mr. Wendell, and I will be pleased to respond to any questions you or the other members may have.

Thank you, Mr. Chairman.

Chairman RANGEL. Commissioner, I want to thank the Service for the cooperation which they have extended to our congressional subcommittee, and especially Mr. Winborne, who has worked very closely with the Oversight Subcommittee.

I notice in your statement that you indicate there is a strategy task force. Is that correct?

Chairman RANGEL. And you have no problem, I hope, in saying that the Labor Department generally has jurisdiction over violations of the fiduciary relationship, that IRS deals with violation of the qualified retirement plans, and that the Justice Department is responsible for the prosecution of individuals accused of criminal violations.

Mr. EGGER. That is correct, Mr. Chairman. That is the reason why all three of the departments are participants in the task force.

Chairman RANGEL. You work together as a task force?

Mr. EGGER. Yes, sir.

Chairman RANGEL. I ask you what I'm asking the other members, to please send a status report to the committee as to where you are in this overall investigation.

Mr. EGGER. Yes, sir.

[The information follows:]

COMMISSIONER OF INTERNAL REVENUE,
Washington, D.C., October 30, 1982.

HON. CHARLES B. RANGEL,
Chairman, Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We are pleased to provide you a status report on the Service's recent activities involving the Teamsters Central States Pension Fund. You requested this report at the hearing before your Subcommittee on July 26, 1982, concerning the progress of the Government's efforts to enforce reform of the Central States Fund. The information that we are furnishing does not include any confidential tax information within the meaning of section 6103 of the Internal Revenue Code.

In this report, I would like to bring you up to date concerning the new determination letter issued to the Fund and the Service's examination of the Fund. Also, I will describe how the Service's actions were coordinated with the Labor Department's negotiations with the Fund, which culminated in a consent decree agreement.

NEW DETERMINATION LETTER

As I indicated in testimony on July 26, one of the most important actions taken by the Service concerning the Fund during the past year was the issuance of a new determination letter to the Fund on November 11, 1981. The Fund applied for this new determination letter in 1979 because of plan amendments that were adopted following negotiations for a new collective bargaining agreement between the Teamsters Union and the trucking industry. As you know, the new determination letter restated certain conditions that were contained in the requalification letter issued to the Fund in 1977 and which the Service believes are necessary to assure that the Fund will continue to comply with the requirement that qualified retirement plans be operated for the exclusive benefit of employees and their beneficiaries.

The most important condition restated in the determination letter issued in 1981 requires the Fund to continue to transfer all of its assets to qualified, independent asset managers, except for a small percentage of assets necessary for benefit payments and administrative expenses. The term "investment manager" is defined by section 3(38) of the Employee Retirement Income Security Act of 1974 ("ERISA") to mean any fiduciary who has the power to manage, acquire, or dispose of any asset of an employee benefit plan who is (1) registered as an investment advisor under the Investment Advisor Act of 1940; (2) a bank; or (3) an insurance company authorized to manage the assets of an employee benefit plan under the laws of more than one state.

The condition requiring the management of the Fund's assets by qualified, independent investment managers is of substantial importance to the Fund's contributing employers and participating employees because it provides some deterrence against the kinds of abuses that led to the disqualification of the Fund in 1976. The Fund is currently in compliance with this condition because the great majority of its assets continue to be managed by Equitable Life Assurance Society under the agreement appointing Equitable as the Fund's named fiduciary.

The Fund's new determination letter places more stringent limitations on the amount of assets that the Fund may retain for benefit payments and administrative expenses. Under the guidelines in the letter, in a given month, the trustees may retain only those assets that have actually been determined to be necessary for those purposes, taking into account assets that can be obtained from the independent asset managers. Amounts that can be retained by the Fund are also subject to an overriding cap equal to 2½ times the sum of the previous month's benefit payments and administrative expenses. Also, amounts that are retained by the Fund must be managed and invested in accordance with the advice of a qualified investment manager.

Since the issuance of the Fund's latest determination letter, our Chicago District Office has monitored the Fund's compliance with the cap imposed on assets retained by the Fund. During this period, assets retained by the Fund have not exceeded the cap.

EXAMINATION OF FUND

As I testified at the hearing on July 26, the Service issued an administrative summons in April, 1980 to begin an examination of the Fund's operations. Although most informtion about this examination is subject to the disclosure restrictions under section 6103 of the Code, I can tell you that the Fund provided a document to the General Accounting Office indicating that the Service had not changed the Fund's tax liability for the plan years 1976 and 1977. GAO published this document as part of an appendix to its report entitled "Investigation to Reform the Teamsters' Central States Pension Fund Found Inadequate" and dated April 28, 1982.

COORDINATION WITH LABOR DEPARTMENT

Although the Fund agreed to the condition in its latest determination letter calling for the Fund's continued use of an independent asset manager arrangement, the Service is also very pleased with the recent outcome of the consent decree negotiations between the Fund and the Labor Department. As you know, in March, 1981 the Secretaries of the Treasury and Labor and the Attorney General established a Litigation Strategy Task Force to coordinate the activities of the Treasury, Labor and Justice Departments concerning the Fund. Since its creation, the Task Force has met more than 30 times concerning various aspects of the Government's enforcement activities involving the Fund. For example, the Service coordinated closely with the Task Force concerning the conditions in the Fund's latest determination letter.

Since the creation of the Task Force, representatives of the Labor Department have met with the Fund's representatives almost 30 times. The negotiations have covered a wide range of ERISA issues, including allegations involving actions by the trustees prior to the disqualification of the Fund in 1976, the Fund's disposition of certain real property subsequent to the disqualification, the Fund's acquisition and use of a jet aircraft, and alleged violations involving the Central States Health and Welfare Fund.

Throughout these negotiations, a key demand by the Labor Department has been that the Fund agree to provisions in a consent decree that would assure the long-term continuation of an independent asset manager arrangement with protections similar to those in the Fund's current agreement with Equitable Life Assurance Society. The importance of this demand is underscored by the fact that in August, 1981 the Fund applied for exemptions from ERISA's prohibited transaction requirements that would have permitted the Fund to continue its relationship with Equitable in a modified form. Under the new Equitable agreement then being considered by the Fund, the trustees of the Fund would have assumed an enlarged role in the formulation of the Fund's investment policies. In addition, the trustees would have had the authority to terminate the agreement with limited notice and without any assurance that Equitable would be replaced by another qualified independent asset manager. The Labor Department did not grant these exemptions.

In contrast to the proposed asset management arrangement involved in the Fund's exemption application, the arrangement proposed by the Labor Department and eventually accepted by the Fund in the consent decree negotiations assures that changes in the Fund's investment policies would be subject to judicial supervision and that terminated independent investment managers would be replaced by new investment managers with appropriate qualifications. In addition, the consent decree places controls on the assets retained by the Fund for benefit payments and administrative expenses that parallel the controls established under the Fund's latest determination letter. Also, under the decree, an Independent Special Counsel will be appointed to oversee the Fund's compliance with the consent decree and with conditions in determination letters issued to the Fund. The Fund's consent decree is a landmark in the administration of ERISA. The consent decree puts trustees and other pension plan fiduciaries on notice that they must satisfy their obligations to manage the assets of pension plans in accordance with the requirements of the law.

For reasons that I discussed in my testimony on July 26, the Fund's recent agreement to the consent decree proposed by the Labor Department is an important protection for the Fund's contributing employers and participating employees. Without the consent decree and the new legislation proposed by the Administration concerning conditions in determination letters, the only potential sanction available to the Government to prevent the return of the Fund's assets to the direct control of the Fund's trustees after the expiration of the Equitable agreement would be the disqualification of the Fund. The sanction of disqualification would not be effective in preventing the trustees of the Fund from regaining direct control of the assets because the impact of disqualification would not be felt by those responsible for that action.

I want to assure you that the Service will live up to its responsibilities concerning the proper management of the assets of the Central States Fund, and that we will cooperate closely with the other agencies represented in the Litigation Strategy Task Force to assure that the Government's enforcement activities in this case are properly coordinated.

With kind regards,

Sincerely,

ROSCOE EGGER.

Chairman **RANGEL**. Mr. Jenkins?

Mr **JENKINS**. Mr. Chairman. I have no questions at this time.

Chairman **RANGEL**. Mr. Pickle.

Mr. **PICKLE**. Mr. Egger, I appreciate your testimony and your statement.

One of the conditions contained in the latest IRS determination letter is that the fund continue to have independent asset managers.

If you had independent asset managers, do you in addition need the legislation that you are requesting?

Mr. **EGGER**. Well, the problem is what happens if that condition is violated, what happens if that condition is not carried out? Our difficulty with it is, as we have said and as Secretary Donovan testified, that we have no other sanction except to do as we did in 1976, which is to withdraw the qualification of the plan. This impacts very, very heavily on the employers who are making the contributions, since it takes away their deduction, and makes the plan income subject to tax in the hands of the employees. So it hits at the wrong people.

What we are looking for here is a way to head off this kind of a problem, either with the Central States Fund or with other funds in similar circumstances.

As you can see, in most of these large multiemployer plans, whether they be pension plans or health and welfare plans, you do have this problem of how to get at a violation of the fiduciary responsibilities or a violation of ERISA qualification by the plan administrators or the trustees, as the case may be.

So we think that this legislation makes awfully good sense in order to hold off situations that force us into the action that we had to take in the case of Central States.

Mr. PICKLE. The agreement that the Teamsters Fund and the Government are operating under now will expire on October 2?

Mr. EGGER. Yes.

Mr. PICKLE. As of October 3, there is no agreement, I presume.

Mr. EGGER. There would be no agreement between——

Mr. PICKLE. With the independent assets manager?

Mr. EGGER. That is correct.

Mr. PICKLE. And if that developed, then the fund would have control over the assets?

Mr. EGGER. That is correct.

Mr. PICKLE. Its investments, its policies, or anything else he wanted to do?

Mr. EGGER. That is correct.

Mr. PICKLE. Now, the time is short, and you are asking in addition to a new agreement that we have additional legislation with respect to a possible tax in the event of a per se violation of a prohibited transaction.

In order to have this legislation, though, you must have an agreement of the parties involved. That is, the fund must agree with Labor and Justice and IRS that this is workable, that they agree to it. It is my understanding that they will agree to it or have agreed to it. Is that correct?

Mr. EGGER. They have already agreed to it in the determination letter which we issued last year.

Mr. PICKLE. They have agreed to an independent assets manager?

Mr. EGGER. That is correct.

Mr. PICKLE. But I understand that is on condition, there is some misunderstanding, provided they would have some voice in both the policy of the assets and the investment policy.

Is there a condition to their agreement?

Mr. EGGER. Let me answer quickly, on the basis of my own knowledge, and then ask Mr. Winborne to elaborate.

My understanding is that in negotiating for a subsequent agreement, there are certain conditions which are not present in the current agreement, such as the ability to have a voice in the policy, investment policy, and an ability to terminate the agreement on some short-term notice as well.

Mr. PICKLE. Do you think that the fund needs to have a voice in the policy as well as the investment of the assets as a basis for the resigning of the agreement?

Mr. EGGER. Our previous arrangement is that the independent asset manager is just that, independent, and has full responsibility for the management of the assets, and then is advised by professional investors for the purpose of setting investor policy.

Mr. PICKLE. If they must be independent, then there cannot be any conditional agreement?

Mr. EGGER. That is correct.

Mr. PICKLE. And if the fund will agree to a complete renewal of the present agreement, they would then allow this additional legislation to be added.

Mr. EGGER. Then we would have the situation we have before us.

Mr. PICKLE. If you don't do that, then the only remedy, you go back to the withdrawing of the tax qualification?

Mr. EGGER. That is the way we see it.

Mr. PICKLE. And you recommend the legislation?

Mr. EGGER. Yes, indeed.

Mr. PICKLE. Thank you, Mr. Chairman.

Chairman RANGEL. Mr. Duncan?

Mr. DUNCAN. I have no questions.

Chairman RANGEL. Are there any other questions?

Thank you, Mr. Commissioner.

George Lehr, executive director, Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds.

Mr. Lehr, I assume you have heard the testimony of the previous witnesses, and we have had a chance to review your full statement. That statement will be entered into the record. You can summarize it, if you see fit, and respond as you think would be in the best interests of the pension fund.

STATEMENT OF GEORGE W. LEHR, EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS

Mr. LEHR. Thank you, Mr. Chairman.

My name is George Lehr. On October 5, 1981, I became executive director of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds.[1] On behalf of the trustees of those funds, I wish to express my appreciation to the subcommittee for inviting me to appear here today.

In my judgment, this subcommittee is to be commended for its diligence and leadership in monitoring the administration and operation of the employee benefit plan laws.

Mr. Chairman, I was raised in Kirksville, Mo., graduated from the University of Iowa, and professionally I am a certified public accountant.

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[1] The Central States Pension Fund is an employee benefit plan created in 1955 which provides retirement benefits to employees covered by Teamster collective bargaining agreements in all facets of industry. While the basic geographical area of the pension fund consists of 33 States in the Central and Southern areas of the United States, the fund also has participants in New York, Arizona, and other locations, and approximately 99,000 retirees receiving benefits in virtually every State in the Union, as well as several foreign countries. The fund currently has approximately 340,000 active participants and 13,500 employers. The Central States Health and Welfare Fund is an employee benefit plan created in 1950 which provides health care and related benefits to employees in the Teamster industries, and their dependents. The geographic area of the health and welare fund is basically limited to 33 Central and Southern States. There are approximately 6,000 employers contributing to this fund on behalf of approximately 184,000 participants. These funds provide approximately $63 million each month in the form of benefit payments to some 283,000 beneficiaries and their families.

I have previously served as State auditor of Missouri, and county executive, presiding judge, and auditor of Jackson County, which is Kansas City, Mo.

Immediately prior to becoming executive director of the funds, I was chairman of the board and chief executive officer of Traders Bank in Kansas City, Mo.

Mr. Chairman, the subcommittee has requested that we address the following subject areas:

(*a*) Current conditions of the pension fund;

(*b*) Status of negotiations with the Government;

(*c*) The fund view on the legislative need for additional ERISA remedies.

I will comment briefly on each of these points and then be pleased to respond to any questions the subcommittee may have.

The assets of the pension fund have continued to grow since 1980. The total assets of the pension fund increased from $2.98 billion as of December 31, 1980, to $3.31 billion as of December 31, 1981. Contribution income has increased from $645 million in 1980 to $676 million in 1981. The unfunded actuarial liabilities of the pension fund continue to be amortized at a rate which is more rapid than the period required under the minimum funding standards of ERISA.

The pension fund recently completed a comparative analysis of the investment performance of 14 of the largest Taft-Hartley multiemployer funds in the Nation. The report was based upon certified financial data presented in the form 5500 annual reports filed by these funds for the 1978 through 1980 fiscal periods.

I am pleased to announce that our pension fund ranked No. 4 out of the data base of 14 with regard to return on investments. I have attached a copy of this document to my statement for your information.

I have worked closely with the trustees in the implementation of strengthened administrative capabilities and practices of the pension fund in a number of critical areas:

(*a*) Expansion of the employer contribution data base to encompass receipts under collective bargaining agreements which call for contributions on a daily basis.

(*b*) Implementation of participant credited service notification systems as a safeguard against delinquent employer contributions.

(*c*) Development of a preretirement data verification system.

(*d*) Development of a controlled group data base for the amount of withdrawal liability and verification of past service credits.

I might add—and I would certainly invite the staff or any Congressman who would like to come to see our system—I think we probably have the most sophisticated data processing system of any pension fund in the country. Numerous funds come and study our system.

(*e*) Strengthening of litigation and collection procedures by establishing special task forces in the areas of bankruptcy, collection of delinquent accounts and withdrawal liability assessment.

(*f*) Implementation of more cost-efficient mailing procedures, including establishment of presorting systems and internalization of operations.

(*g*) Establishment of a participant service center to improve information dissemination. Beginning in early August we will be the only pension fund in the country with a 24-hour-a-day toll-free line, where a participant can call in and have his questions answered by a person, by an individual, not a recording. The staff will have computer terminals, and they will update the participant's status on any pension information or health and welfare information.

(*h*) Modification of the investment policies for the benefits and administration account to preclude nonsecured commercial paper.

(*i*) Improvement of our continuing liaison with the Department of Labor and Internal Revenue Service.

We think there has been significant improvement in the last 18 months to 2 years in that regard. We probably have had an average of eight individuals from those agencies in the funds day in and day out over that period of time.

(*j*) Development of constructive dialog with trucking industry representatives concerning withdrawal liability issues which may lead to appropriate legislative and administrative reform.

(*k*) Establishment of open communication policies with the Government and the media.

With regard to the status of negotiations with the Government, let me say here, and I speak on behalf of the trustees, the only thing that can put to rest what Congressman Pickle and others have spoken of here today, in my opinion, and in the trustees' opinion, is a consent decree, which will encompass many of the problems which have plagued this fund, and the Government, and the various oversight committees for a number of years.

We want that consent decree to be as comprehensive as possible. We want independent asset management, and we understand the controls that the Department of Labor wants on that independent asset management. But I could not agree more that—in fact I think we probably pushed this point as much or more than anyone—we need a consent decree, we want a consent decree. The trustees don't feel that they necessarily should have one. However, based on the history of this fund, they have said that they would put a consent decree in place so that we can have some years that this fund can grow and take its place as the leader in pension funds in this country, and in my opinion its rightful place.

For many years the funds have been the object of criticism by various Government agencies, the Congress, and the media. For both the funds and the Government, this continued controversy has resulted in incalculable costs in investigations, hearings, legal proceedings, and impaired administration.

During the period 1976–77, a number of significant changes in the administration of the pension fund were agreed upon by the trustees and the Government. These included retention of independent asset managers, voluntary resignation of incumbent trustees, improvement of the data base, review of various benefit claims, and establishment of an internal audit staff.

In June 1981, at the direction of the trustees, negotiations were undertaken between representatives of the funds, the Department of Labor, and the IRS in a comprehensive effort to resolve various issues so that a constructive new era of cooperation could begin for the benefit of the plan participants, beneficiaries, and the public interest.

The funds' goal, which we assume to be shared by the Department of Labor—and I must say all indications are it is shared by the Department of Labor, and, although they have been very tough negotiators, they have been very fair negotiators—has been to resolve all our current differences and to establish procedures which would minimize future problems, and thus be in a position to devote all our resources and manpower to the management of the funds.

I think one of the most significant statements which has been made recently in that regard, and this was in regard to our position, as opposed to the Department of Labor's—somewhat opposed to the Department of Labor's—that this settlement should be comprehensive, is a statement made by Judge Moran, a Federal judge in Chicago, on July 9, 1982, and I quote:

> . . . if I were a trustee of the fund, I would look upon the total cessation of litigation and the end of that expense and that diversion as one of my highest priorities as a fiduciary.

We also agree with Secretary Donovan that the proper spirit for approaching past problems in the ERISA area is to structure mechanisms which would preclude their repetition. Secretary Donovan said on October 28, 1981, before the Senate Permanent Subcommittee on Investigations:

> We are not here to discuss the mistakes of the past. We are here to tell you of our new determination and our positive actions. We have responded in a similar fashion to the General Accounting Office review of the Department's handling of the Central States Funds investigations. We agree with the thrust of the recommendations of the GAO, and many of them have already been independently put in place at my direction. However, the report itself deals in the main with events which took place in the past. We at Labor are concerned with the present and the future.

We have offered to enter into an historic and sweeping consent order under the jurisdiction of a Federal court which would last for a decade or more. In our attempts to negotiate a responsible settlement, we have proposed to write into that order unprecedented institutional safeguards.

I think just the very fact that there is an agreement on the need for a consent decree is a major breakthrough. I understand we now have to put that to bed by signing it, and I hope that will be significantly before October 3.

The experience of the pension fund with the Internal Revenue Service demonstrates that differences with a governmental agency can be worked out if both parties are willing to compromise on a reasonable basis.

The IRS revoked the qualified tax status of the pension fund in June 1976, but then retroactively reinstated the fund's qualification letter in April 1977 after agreement was reached on eight conditions for requalification. The pension fund's cooperation under its earlier agreement with the IRS and its compliance with those eight conditions were acknowledged in testimony delivered on November 2, 1981, before the Senate Permanent Subcommittee on Investigations by Donald Bergherm, then director of the Chicago District Internal Revenue Service Office.

This spirit of cooperation and compliance is further evidenced, in my opinion, in the terms of a new determination letter which the IRS issued to the pension fund on November 11, 1981. The funds believe strongly that a responsible settlement with the Department of Labor is also achievable, and is achievable prior to the October 3 date.

Mr. Chairman, after many difficult months of negotiations, these discussions are now at a most critical juncture. It is apparent to me that both sides are seriously attempting in good faith to resolve the very few remaining differences to their mutual satisfaction.

I would hope that the subcommittee would support in every appropriate way this landmark endeavor. I personally look forward to the opportunity to appear before this subcommittee in the near future with appropriate government officials to announce the successful conclusion of our efforts.

With regard to the fund's view on the legislative need for additional ERISA remedies, Mr. Chairman, I appreciate the interest which the subcommittee and the Departments have taken regarding the asset management of our pension fund. As you are aware, the contracts with our present investment managers are due to expire on October 3, 1982.

As a preliminary matter, however, I must express my strongest disapproval of the allegations which the Department of Labor has raised against the pension fund in its letter of endorsement of the proposed legislation. While we certainly have agreed on many things and certainly have talked a great deal, we still have some disagreements, and this is one of them.

The Department's letter implies that the pension fund will not continue the use of independent asset managers after October 3, 1982.

Mr. Chairman, I have been authorized and indeed directed by our trustees to reaffirm before you our commitment to the retention of independent asset managers.

Now that commitment stands whether or not there is a consent decree. That commitment is to have independent asset managers from among the 25 largest banks, insurance companies, or investment houses in the country. That commitment is complete and total. We will have independent asset managers on October 3, 1982, and the agreement will be professional, it will be complete, and it will keep the trustees from any involvement with the daily decisions on the management of the assets. That is a commitment that I am making here today on behalf of the trustees.

The Department of Labor's letter also suggests that the pension fund may have, in some fashion, attempted to undermine the independence of our present asset managers. In response to these allegations, I quote Mr. Leo M. Walsh, senior vice president of the Equitable Life Assurance Society of the United States, the pension fund's independent asset manager, who in testimony before this subcommittee on March 24, 1980, stated:

> We are not aware of anything which could be characterized as an assault on our independence or on our role as named fiduciary and investment manager . . . It is a good working relationship . . . They have not become involved in day-to-day activities.

In addition, John A. Koskinen, president, Victor Palmieri & Co., Inc., the pension fund's real estate asset manager stated:

> . . . [T]he trustees' monitoring of our daily work has not interfered with our ability to operate as an investment manager.

Finally, and I think very significantly, in a letter dated June 28, 1982, Equitable, on the basis of 5 years' experience with the pension fund and its trustees, made emphatically clear that there was, in fact, no foundation for such charges:

> To reiterate the position of the Equitable, let me say that we value the business of Central States very highly and we consider this fund our most important client. We have thoroughly enjoyed this assignment since June 1977 . . . As important as anything else, we respect and admire the trustees and their concern for the welfare of this pension fund.

I had hoped that prior to this hearing we would have completed negotiations with the Department of Labor and the IRS to develop a binding consent decree incorporating a number of items of past concern, including this issue of independent asset management. I remain optimistic that such a consent decree can be formulated well before the October 3 date. Such a settlement would eliminate the concerns which supposedly call for the legislative proposal which has been described earlier today.

By the way, I am not certain we have seen the final draft of that proposal, so our comments are directed to the draft that we have seen. We have not officially been given a draft of that proposal.

We have responded to your request for technical comments concerning this proposal and have attached for the benefit of the subcommittee our legal analysis. Our technical review indicates that such legislation is not needed in view of the existing enforcement provisions available under ERISA, including the 100-percent excise tax which can be imposed by the IRS against any prohibited transaction, and the broad range of equitable remedies, including the required appointment of an independent asset manager, which can and have been judicially granted at the request of the Department of Labor. The retention of an investment manager was recently mandated by the U.S. District Court for the Northern District of California in the case of *Donovan* v. *Mazolla* (No C–79–134 SAW, July 6, 1982.)

Even though we have presented these comments, I want to put something on the record and make it entirely clear. We are not in any way seeking to oppose this legislation, as we feel it is superfluous from our standpoint. This legislation will not solve the problem between Central States and the Government. We are not opposing it. It is superfluous from our standpoint.

The pension fund has developed a very high set of standards regarding the qualifications of its independent asset managers and will continue to insist upon these criteria which far exceed anything suggested in the proposed legislation.

If this bill is intended to convey the impression that independent asset management is a real problem with our pension fund, I strongly resent the implication.

In conclusion, Mr. Chairman, when I left Kansas City to become executive director of the funds, there were many friends, associates, and members of the media who questioned my making such a change, by which I relinquished the relative tranquility and security of my former responsibilities in exchange for the controversy and criticisms associated with the new assignment.

I accepted this obligation because, after meeting with the trustees, I was convinced that they were dedicated to the realization of one goal, to insure that the pension fund enjoy its rightful place as a national leader in sound pension management.

Nearly 1 year has elapsed since I began this undertaking. I want the subcommittee to know that our pension fund, like any organization of comparable size and complexity, inevitably experiences difficult problems; however, my confidence in our capacity to succeed is greater today than when I accepted this challenge.

As one reviews the troubled history in the relationship of various governmental agencies and the pension fund, a recurrent problem is the lack of coordination and shortcomings in the Government's various initiatives to monitor the performance of our pension fund. Mr. Chairman, it is this fact as much as any other that has constituted a formidable impediment to the resolution of so many mutual problems.

I noted most recently, and I commend the Departmment of Labor for the action they have taken in this regard, that in addition to the GAO report of April 28, 1982, there is reportedly an internal Department of Labor study which recommends major reorganizations in the administration of pension plan oversight.

Mr. Chairman, there is nothing about which I feel more strongly than expressing support on behalf of our trustees for the adoption of improvements in this regard. Frankly, it is impossible to calculate the waste and the resulting cost to both the pension fund and the Government for nearly a decade due to duplications, overlap, and inefficiency in establishing an enduring and successful monitoring program.

Speaking for our trustees, I can assure this subcommittee that no group in this Nation more genuinely supports whatever changes are deemed appropriate to improve this machinery because, in fact, the funds have suffered more than anyone else in unnecessary costs and controversy under the existing situation.

Mr. Chairman, I come to this subcommittee feeling a little like the late Egyptian President Sadat on the occasion of his visit to Israel, and I propose on behalf of my trustees that the time is long past due for an end to the years of sterile and barren warfare between our funds and our Government. The costs have been large and tragic to those involved.

I would therefore urge that representatives of our funds and the appropriate committees of Congress and the various departments of the executive branch commit themselves to the formation of a new compact that is fair to all parties. We have it within our power to settle most of our pending litigation, establish a framework of judicially enforceable institutional safeguards for fund administration, and provide for ongoing procedures for a constructive future relationship.

We share an obligation to demonstrate the wisdom and courage to seize this opportunity and make possible a new era of cooperation between our funds and the Government.

Thank you.

[Attachments to Mr. Lehr's statement follow:]

Central States Pension Fund—Taft-Hartley Trust Comparison

The average annual dollar-weighted ROI was calculated using net investment income and average net assets available for plan benefits for each year. Identical procedures for each fund were used in every calculation to ensure consistency and continuity in the comparisons. When comparing the Central States Pension Fund with the other funds in the group, it should be noted that there are differences in size, portfolio composition, investment philosophy and actuarial funding requirements for each fund. The wide range of results in any given year reflect these differences as well as investment performance.

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—RETURN ON INVESTMENT

[In percent]

	1978	1979	1980	3-yr average
Western Conference of Teamsters [4]	7.23	8.70	10.79	8.91
Central States Pension Fund [4]	6.04	8.01	13.02	9.02
United Mine Workers [3]	10.00	7.64	10.60	9.41
National Electrical Contractors Association [4]	2.94	4.76	5.43	4.38
Boilermakers [4]	4.00	10.52	15.57	10.03
Bakery and Confectionary Union [2]	4.73	9.43	9.06	7.74
Operating Engineers [1]	9.28	10.12	7.64	9.01
National Union of Hospital and Health Care Employees [4]	4.17	8.33	12.21	8.24
New England Teamsters [5]	5.90	7.56	5.90	6.45
Sheet Metal Workers [4]	6.19	9.56	12.75	9.51
International Association of Machinists [4]	5.57	7.14	12.06	8.26
International Ladies Gar[illegible]rs [4]	(.01)	(.85)	.46	(.13)
Teamsters Local 705 [illegible]	4.78	5.94	9.70	6.81
District 65 and con[illegible] (auto workers) [1]	5.87	.9	14.85	7.21

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[1] Taxable year [illegible] Jan. 31.

[2] Taxable year [illegible] May 3[illegible]

[3] Taxable year ends Ju[illegible]

[4] Taxable year ends Dec[illegible]

[5] Taxable year ends Sep[illegible]

CENT[illegible] STATES PENSION FUND, TAFT-HARTLEY STUDY—NET ASSETS AVAILABLE FOR PLAN BENEFITS AT PLAN YEAR END

[In thousands of dollars, per line 14q]

	1978	1979	1980
Western Conference of Teamsters	2,298,259	2,724,136	3,257,551
Central States Pension Fund	1,997,157	2,431,564	3,080,705
United Mine Workers	703,551	914,902	1,105,506
National Electrical Contractors Association	548,880	671,385	940,911
Boilermakers	536,446	661,933	837,220
Bakery and Confectionary Union	524,926	607,256	692,299
Operating Engineers	358,097	458,426	568,860
National Union of Hospital and Health Care Employees	280,920	358,076	471,881
New England Teamsters	284,186	393,434	433,954
Sheet Metal Workers	174,338	233,209	312,503
International Association of Machinists	211,378	253,000	310,096
International Ladies Garment Workers	265,230	270,533	280,352
Teamsters Local 705	152,447	174,738	201,852
District 65 and contributing employers (auto workers)	141,877	138,541	175,272

Central States Pension Fund, Taft-Hartley Study—Growth in net assets available for plan benefits

	Compound annual growth rate 1978-80
Western Conference of Teamsters	12.3
Central States Pension Fund	15.5
United Mine Workers	16.3
National Electrical Contractors Association	19.7
Boilermakers	16.0
Bakery and Confectionary Union	9.7
Operating Engineers	16.7
National Union of Hospital and Health Care Employees	18.9
New England Teamsters	15.1
Sheet Metal Workers	21.5
International Association of Machinists	13.6
International Ladies Garment Workers	1.9
Teamsters Local 705	9.8
District 65 and contributing employers (auto workers)	7.3

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—NUMBER OF PARTICIPANTS

[Including retirees, per line 7f]

	1978	1979	1980
Western Conference of Teamsters	541,788	532,435	536,915
Central States Pension Fund	515,061	527,626	505,389
United Mine Workers	178,230	177,396	178,259
National Electrical Contractors Association	220,720	242,200	248,555
Boilermakers	77,509	82,539	83,602
Bakery and Confectionary Union	112,195	117,895	122,186
Operating Engineers	106,079	110,254	109,393
National Union of Hospital and Health Care Employees	80,413	81,804	88,796
New England Teamsters	64,050	65,369	67,005
Sheet Metal Workers	61,175	74,490	75,760
International Association of Machinists	94,237	98,799	97,514
International Ladies Garment Workers	360,518	339,590	384,464
Teamsters Local 705	18,873	20,527	17,689
District 65 and contributing employers	29,143	30,284	29,926

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—ANNUAL CONTRIBUTIONS

[In thousands of dollars, per line 14c]

	1978	1979	1980
Western Conference of Teamsters	294,068	435,030	464,154
Central States Pension Fund	497,149	606,566	651,926
United Mine Workers	226,257	217,410	166,866
National Electrical Contractors Association	113,740	130,763	141,713
Boilermakers	78,363	90,249	90,390
Bakery and Confectionary Union	96,088	105,232	112,613
Operating Engineers	69,239	81,838	85,834
National Union of Hospital and Health Care Employees	50,660	59,542	73,929
New England Teamsters	59,640	69,921	75,202
Sheet Metal Workers	39,736	48,437	57,057
International Association of Machinists	45,557	51,681	52,236
International Ladies Garment Workers	107,476	117,561	137,978
Teamsters Local 705	24,375	29,752	30,534
District 65 and contributing employers (auto workers)	3,692	11,416	10,321

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—ANNUAL NET CONTRIBUTIONS [1]

[In thousands of dollars, per line 14c less line 14h]

	1978	1979	1980
Western Conference of Teamsters	86,851	207,311	210,551
Central States Pension Fund	194,097	257,111	290,388
United Mine Workers	173,526	149,545	83,482
National Electrical Contractors Association	79,655	93,435	101,326
Boilermakers	54,879	62,427	58,593
Bakery and Confectionary Union	32,659	28,943	26,476
Operating Engineers	51,093	59,954	60,548
National Union of Hospital and Health Care Employees	43,215	50,443	63,116
New England Teamsters	12,577	19,887	20,586
Sheet Metal Workers	32,687	39,380	44,515
International Association of Machinists	21,601	25,043	23,136
International Ladies Garment Workers	540	7,576	18,352
Teamsters Local 705	9,049	12,579	10,437
District 65 and contributing employees (Auto Workers)	(10,476)	(4,657)	(7,576)

[1] Contributions less benefits.

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—CONTRIBUTIONS PER PARTICIPANT

[Per week]

	1978	1979	1980
Western Conference of Teamsters	$10.44	$15.71	$15.62
Central States Pension Fund	18.56	22.11	24.81
United Mine Workers	24.52	23.47	18.00
National Electrical Contractors Association	9.91	10.38	10.96
Boilermakers	19.44	21.03	20.79
Bakery and Confectionary Union	16.46	17.17	17.72
Operating Engineers	12.55	14.27	15.09
National Union of Hospital and Health Care Employees	12.12	14.00	16.01
New England Teamsters	17.91	20.57	21.58
Sheet Metal Workers	12.49	12.50	14.48
International Association of Machinists	9.30	10.06	10.30
International Ladies Garment Workers	5.73	6.66	6.90
Teamsters Local 705	24.84	27.87	33.20
District 65 and contributing employers (Auto Workers)	2.44	7.25	6.63

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—ANNUAL BENEFITS PAID

[In thousands of dollars, per line 14h]

	1978	1979	1980
Western Conference of Teamsters	207,217	227,719	253,603
Central States Pension Fund	303,052	349,455	361,538
United Mine Workers	52,731	67,865	83,384
National Electrical Contractors Association	34,085	37,328	40,387
Boilermakers	23,484	27,822	31,797
Bakery and Confectionary Union	63,429	76,289	86,137
Operating Engineers	18,146	21,884	25,286
National Union of Hospital and Health Care Employees	7,445	9.099	10,813

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—ANNUAL BENEFITS PAID—Continued

[In thousands of dollars, per line 14h]

	1978	1979	1980
New England Teamsters	47,063	50,034	54,616
Sheet Metal Workers	7,049	9,057	12,542
International Association of Machinists	23,956	26,638	29,100
International Ladies Garment Workers	106,936	109,985	119,626
Teamsters Local 705	15,326	17,173	20,097
District 65 and contributing employers	14,168	16,073	17,897

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—PORTFOLIO MIX

[In percent]

Types of investment	1978	1979	1980
Western Conference of Teamsters:			
Common stock	0	0	0
Debt	0	0	0
Mortgages/real estate	0	0	0
Other [1]	100	100	100
Central States Pension Fund:			
Common stock	20	27	36
Debt	40	42	40
Mortgages/real estate	35	27	20
Other	5	4	4
United Mine Workers:			
Common stock	43	39	46
Debt	44	51	41
Mortgages/real estate	4	7	4
Other	9	3	9
National Electrical Contractors Association:			
Common stock	9	9	8
Debt	34	26	26
Mortgages/real estate	52	58	58
Other	5	7	8
Boilermakers:			
Common stock	31	37	38
Debt	49	40	48
Mortgages/real estate	2	1	1
Other	18	22	13
Bakery and Confectionary Union:			
Common stock	36	34	39
Debt	62	63	57
Mortgages/real estate	2	1	2
Other	0	2	2
Operating Engineers:			
Common stock	37	35	33
Debt	46	43	43
Mortgages/real estate	0	0	0
Other	17	22	24
National Union of Hospital and Health Care Employees:			
Common stock	5	5	9
Debt	56	52	49
Mortgages/real estate	0	0	0
Other	39	43	42
New England Teamsters:			
Common stock	2	5	4
Debt	27	32	36
Mortgages/real estate	70	62	59
Other	1	....	1
Sheet Metal Workers:			
Common stock	13	10	24

CENTRAL STATES PENSION FUND, TAFT-HARTLEY STUDY—PORTFOLIO MIX—Continued

[In percent]

Types of investment	1978	1979	1980
Debt	19	18	23
Mortgages/real estate	1	0	0
Other	67	72	53
International Association of Machinists:			
Common stock	25	20	32
Debt	57	51	51
Mortgages/real estate	13	18	16
Other	5	11	1
International Ladies Garment Workers:			
Common stock	0	0	9
Debt	56	69	75
Mortgages/real estate	9	4	5
Other	35	27	11
Teamsters Local 705:			
Common Stock	9	9	13
Debt	69	72	68
Mortgages/real estate	4	4	3
Other	18	15	16
District 65 and contributing employers (auto workers):			
Common stock	23	24	23
Debt	67	67	67
Mortgages/real estate	0	0	0
Other	10	9	10

[1] Other includes: Pooled funds, group annuity contracts, and majority-owned companies.

ADEQUACY OF PRESENT ERISA ENFORCEMENT REMEDIES: IS THERE A NEED FOR ADDITIONAL LEGISLATION?

1. BACKGROUND

The most recent favorable determination letter issued to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund") by the Internal Revenue Service sets forth, as a specific condition of ongoing qualification, the requirement that Fund assets be transferred to one or more qualified independent investment managers, as defined in Section 3(38) of ERISA. Under the terms of the determination letter, the Fund retains custody of a defined level of reserves for benefit and administrative expenses and manages such reserves in accordance with the advice of a qualified investment manager. The remainder of the Fund assets are held and invested by outside investment managers consisting of The Equitable Life Assurance Society of the United States and Victor Palmieri and Company. The present contracts with these entities are due to expire on October 3, 1982.

The relative proximity of this expiration date has apparently generated concern on the part of the Department of Labor which has endorsed legislation imposing a unique set of penalties on the Fund if it did not continue to provide for independent asset management beyond October 3, 1982.

2. CURRENT ERISA ENFORCEMENT MECHANISMS

A. Internal Revenue Service penalty tax provisions

At the present time, there is no provision in ERISA or in the Internal Revenue Code of 1954 which requires or even suggests that the retention of an independent asset manager should be required as a condition of tax qualified status. There are, however, a number of provisions in both statutes which identify and prohibit specific potentially abusive transactions, such as the sale or lease of property between a plan and a party in interest and the lending of money or other extension of credit between a plan and a party in interest.

These activities, frequently referred to as "prohibited transactions", are set forth in Section 406(a) of ERISA and in Section 4975(c) of the Internal Revenue Code. Although a prohibited transaction may not, in all cases, inflict economic harm on a plan, the overall potential for financial detriment in the enumerated categories are such that Congress created a presumption of wrongdoing in these areas which can only be overcome through a statutory or administrative exemption.

The commission of a prohibited transaction which has not been the subject of an applicable exemption will result in significant penalties under current law. Section 4975(a) of the Internal Revenue Code imposes an initial tax equal to five percent of the entire amount involved in the prohibited transaction. The tax is assessed against the person involved in the transaction with the plan and is levied for each year (or part thereof) that the transaction has continued. In addition, Section 4975(b) allows the Internal Revenue Service to impose an additional tax equal to 100% of the amount involved if the transaction is not corrected in a timely fashion.

B. Flexible judicial remedies

ERISA also contains a number of enforcement mechanisms available to the Department of Labor in connection with prohibited transactions.

Sections 501 and 502 of ERISA state that broad criminal and civil penalties and other appropriate equitable relief can be judicially imposed when the Department of Labor or any other interested party brings an action to redress any violation of ERISA or enforce any provision of ERISA. In addition, Section 409 of ERISA deals with the consequences of a breach of any fiduciary duty. The section states that a fiduciary shall be personally liable to make good to a plan any loss resulting from a breach of fiduciary responsibility and shall be subject to "such other equitable or remedial relief as the court may deem appropriate."

These ERISA provisions were characterized by Jerome Kurtz, the former Commissioner of the Internal Revenue Service, in his March 24, 1980 testimony before this Subcommittee as providing the Department of Labor with "a wide range of remedies" including "petitioning courts for equitable relief which can be very carefully tailored to the particular case." In addition, in response to a request for written responses to questions formulated by the Subcommittee on Oversight on May 7, 1980, Ray Marshall, the former Secretary of Labor, characterized the present provisions of ERISA as follows:

"ERISA provides that a civil action may be brought by the Secretary in the United States District Court to obtain whatever equitable relief might be appropriate to redress a violation of the statute or to enforce its provisions. Historically, the courts have found their equity power to be broad enough to fashion whatever remedies equity required, and we are confident that they will continue to do so."

Indeed, the ability of the Secretary of Labor to successfully request a judicial appointment of an independent investment manager in appropriate cases was affirmed earlier this month by the United States District Court for the Northern District of California in the case of *Donovan* v. *Mazzola* (No. C-79-134 SAW, July 6, 1982).

3. PROPOSED LEGISLATION

The proposed legislation which the Department of Labor has sponsored would add a new form of prohibited transaction to the present statutory list and would impose a radically new form of penalty.

In brief, the bill would provide that a prohibited transaction would exist if:

(a) a multiemployer plan has received a determination letter from the Internal Revenue Service which contains a condition involving independent asset management, and

(b) the trustees or plan administrators permit the plan to violate such condition.

If the condition is not satisfied, we understand that the bill provides for a monthly tax equal to one-half of one percent of the fair market value of the plan assets involved. In the case of the Fund, this could amount to a monthly penalty tax of approximately $15 million.

The tax is assessed, on a joint and several basis, against the trustees and plan administrator. If the individual trustees do not have sufficient personal assets to pay these penalties, the assessment can be made against the employer or employee representative organization which appointed such trustees.

The penalty tax can be eliminated if the Internal Revenue Service agrees to remove the condition of independent asset management from the determination letter. In addition, an individual trustee can request a waiver of the tax if the Secretary of Labor finds that the trustee's actions or failure to act were for reasonable cause and that action has been taken to correct the violation.

4. TECHNICAL COMMENTS

A. While the Fund is not specifically named in the proposed bill, it appears to be the only multiemployer plan operating pursuant to a determination letter which involves an independent investment manager condition. Even if one were to assume that such determination letters may in the future be issued to other plans, it is significant to note that the bill, by its terms, is restricted in scope to multiemployer plans and will not apply to other types of pension plans. No justification is apparent for this distinction.

B. The letter of endorsement prepared by the Department of Labor states that without the enactment of the bill, the only remedy potentially available to the Internal Revenue Service in the event of a violation of the independent investment manager condition is a revocation of the tax-exempt status of the Fund. The letter then suggests that this remedy is too drastic as it generates adverse tax consequences to plan participants and contributing employers. This statement ignores the mechanisms available under Sections 406, 409, 501 and 502 of ERISA and the penalty tax available under Section 4975 of the Internal Revenue Code. Implicit in this position, however, is the recognition that independent asset management is not a requirement which Congress saw fit to enact as part of ERISA and that an assumption by the Fund trustees of investment authority over Fund assets would simply not constitute a violation of any of the prohibited transactions contained in the law.

C. If the trustees were to actually manage Fund assets in an improper manner, the Internal Revenue Service could impose the excise tax penalties referred to above and the Department of Labor could seek appropriate criminal or civil judicial relief including, if appropriate, the retention of an independent asset manager. Adequate enforcement mechanisms are available to redress any actual wrongdoing.

D. It is true that no "remedy," other than an attempt to disqualify the plan, would exist if the Fund trustees were to manage the Fund assets in full compliance with the provisions of ERISA. The Subcommittee ought to consider carefully whether a legislative penalty should be created that provides an in terrorum sanction against an event which does not itself involve any action previously identified as abusive under federal law.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS NEWS RELEASE, JULY 26, 1982

WASHINGTON, D.C.—Negotiations between the Central States, Southeast and Southwest Areas Pension Fund and the Department of Labor regarding a variety of issues are "at a critical juncture," with a responsible settlement "achievable," George W. Lehr, Executive Director of the Fund, testified today.

At a hearing of the Subcommittee on Oversight of the House Committee on Ways and Means, Lehr discussed the status of the negotiations between the Fund and the Department of Labor, including the question of continued independent management of the Fund's assets.

"I have been authorized and indeed directed by our Trustees," Lehr said, "to reaffirm before you our commitment to the retention of independent asset managers."

Since 1977 the Fund's assets have been managed by the Equitable Life Assurance Society of the United States as named fiduciary.

The matters under negotiation between the Department of Labor, IRS, and the Fund include pending lawsuits over past actions and arrangements concerning the future operations of the Fund.

"After many difficult months of negotiations," Lehr testified, "these discussions are now at a most critical juncture. It is apparent to me that both sides are seriously attempting in good faith to resolve the very few remaining differences to their mutual satisfaction. . . .

"We have offered to enter into an historic and sweeping consent order under the jurisdiction of a Federal Court which would last for a decade or more. In our attempts to negotiate a responsible settlement, we have proposed to write into that order unprecedented institutional safeguards. . .

"I would hope that the Subcommittee would support in every appropriate way this landmark endeavor. I look forward to the opportunity to appear before this Subcommittee in the near future with appropriate government officials to announce the successful conclusion of our efforts."

Lehr, who left the board chairmanship of a Kansas City bank to take over the top job at the Fund on October 5, 1981, described the growth in the Fund's assets—to 3.31 billion dollars at the end of 1981—and a number of internal changes the Trustees have made.

He also described a study showing that, of 14 of the largest Taft-Hartley pension funds in the nation, the Central States Fund ranked fourth in terms of its net return on investment between 1978 and 1980.

Lehr said the long-running controversy regarding the Fund has resulted in "incalculable costs in investigations, hearings, legal proceedings and impaired administration" to both the Fund and the Government.

"The Funds' goal," Lehr said, "which we assume to be shared by the Department of Labor, has been to resolve all our current differences and to establish procedures which would minimize future problems; and thus be in a position to devote all our resources and manpower to the management of the Funds."

With regard to proposed legislation before the Subcommittee dealing with outside asset managment of pension funds, Lehr said he believed it was unnecessary in view of remedies already available it was unnecessary in view of remedies already available under ERISA, but that the Fund would not seek to oppose it.

"The Pension Fund," he said, "has developed a very high set of standards regarding the qualifications of its independent asset managers and will continue to insist upon these criteria which far exceed anything suggested in the proposed legislation."

Chairman **Rangel**. Thank you.

Mr. Duncan.

Mr. **Duncan**. Thank you, Mr. Chairman.

I want to thank you also, Mr. Lehr, for your appearance.

Could you tell me how much your members pay into the pension fund per month, each individual member on his earnings?

Mr. **Lehr**. The employer on the pension side alone, just the pension side, pays, approximately, a maximum of $55 a week—there are different plans—per employee.

The health and welfare contribution, as I recall, is $52 per week.

Mr. **Duncan**. You say employer or employee?

Mr. **Lehr**. That is paid by the employer as part of the contract.

Mr. **Duncan**. Does the employee pay anything?

Mr. **Lehr**. No, sir.

Mr. **Duncan**. Could you also tell us how your fund stands to date as to earnings?

Mr. **Lehr**. For the last 3 years—and I have enclosed a copy of the return on investment information of 14 of the largest pension funds—Central States had an average return, for the last 3 years available, 1978 through 1980, of 9.02 percent. That ranked fourth among the 14 funds we have included in our report.

In 1980 it was 13.02 percent. We hopefully will continue to get those kinds of returns, so we can further reduce our unfunded liability.

Mr. **Duncan**. Have you had any disagreement with your present asset managers on specific loans?

Mr. **Lehr**. We have no input, nor should we have any input, nor do the trustees want any input, into any specific transactions of the current asset managers or of future asset managers. The only thing—and I think this point is important, Congressman—that the trustees have asked for is—we have discussed this with the Department of Labor, and I think there are open minds, on this question, in my opinion based on the discussions we have had—the only thing we ask for is to have input in determining the initial mix. In other words, 40 percent equities, 40 percent debt, and 20 percent real estate.

We want no part of any daily decisions on asset management. We don't feel it is appropriate, the trustees have stated that very, very strongly, and I state it here again today.

Mr. **Duncan**. Do you make recommendations as to what that asset mix is, then?

Mr. **Lehr**. Our proposal is that under the new agreement, and hopefully under a consent decree, the only recommendations we would make would be as to—and we would have to have concurrence from the asset manager, we would not dictate this—the 40-percent equity, 40-percent debt, 20-percent real estate, and that could only be changed with the concurrence of the asset manager.

We do not want to dictate. By the same token, these trustees, like every trustee in this country, have certain fiduciary obligations and these trustees have to have some input, in our opinion, on the question of the overall mix.

I want to repeat, and I cannot repeat it too many times, we don't want to tell an independent asset manager, or suggest, what stock they should buy, what bond they should buy, what piece of real estate they should invest in. That is not the role of the trustees of Central States, and I cannot emphasize that too strongly.

Mr. **Duncan**. You have never made a recommendation, then, on real estate investment or stocks or anything that the asset manager might do?

Mr. **Lehr**. Since I came on October 5, or whatever the date was, 1981, to my knowledge there has not been any such recommendation made, and everything is channeled through me in that regard. I have not made any such recommendation.

Any request is forwarded immediately to Equitable, and they totally and independently make those decisions and that is the way it will continue after October 3.

Mr. **Duncan**. That is very commendable.

Are you using any of the fund for payment of past legal fees or for past malfeasance, or use of the pension fund—are you defending any legal suits or criminal actions of any past——

Mr. **Lehr**. Under our litigation defense cost policy, which has been in effect for many years at Central States, there are some cases that are being defended, some by insurance, and some by the fund. Yes, there are litigation defense costs being paid by the fund in some past cases. Some are being picked up by——

Mr. **Duncan**. Is that a considerable amount of funds you are using?

Mr. **Lehr**. Yes; it is a considerable—well, I guess in relation to the total fund it is not considerable, but to me it is considerable. You are talking in the hundreds of thousands annually or larger.

Mr. **Duncan**. You feel obligated to make the defense of those people in the past?

Mr. **Lehr**. Congressman, that is a policy that has been in effect at the fund for many years, and I think a comparable litigation defense costs policy—we have one and would be glad to have it delivered here this afternoon or tomorrow, a complete outline as to our position on the question of litigation defense costs policies.

[The information follows:]

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND'S MEMORANDUM TO THE DEPARTMENT OF LABOR CONCERNING THE ADOPTION OF A LITIGATION DEFENSE COSTS POLICY

I. Background

During recent negotiations between the Central States, Southeast and Southwest Areas Pension Fund (hereinafter "the Fund"), the Internal Revenue Service, and the United States Department of Labor (hereinafter "DOL"), DOL has suggested to the Fund that the indemnification provisions contained in Article XI of the Master Agreement between Equitable Life Assurance Society of the United States (hereinafter "Equitable"), Victor Palmieri and Company Incorporated (hereinafter "VPCO"), and the Fund dated the 30th of June, 1977 (hereinafter the "Master Agreement"), should be used as a model for all ERISA funds when adopting a litigation defense costs policy. Additionally, the DOL has stated that the clause contained in those provisions requiring proof of financial ability to repay before any amounts are advanced is essential to any indemnification provision to be adopted by any ERISA funds.

On behalf of the fund, this Memorandum will analyze why the indemnification provisions found in the Equitable, VPCO, and Fund agreements should not be used as a model for all ERISA funds adopting litigation defense costs policies, and specifically address why the "proof of financial ability" to repay clause should not be incorporated. Additionally, included in this Memorandum is a proposed litigation defense costs policy which the Fund submits should be used as a benchmark for all ERISA funds.

The indemnification provisions contained in the Master Agreement and proposed by the DOL to be used as a model are as follows:

"To the fullest extent permitted by law, the Trustees acting on behalf of the Fund agree to indemnify and hold harmless Equitable, each investment manager and the custodian (severally sometimes referred to hereinafter as a person or such person) from and against any losses, claims, damages or liabilities, joint or several, to which such person may be subject insofar as such losses, claims, damages or liabilities or actions in respect thereof arise by virtue of this Agreement, or the fiduciary duties and responsibilities undertaken pursuant to this Agreement, and will reimburse each such person for any legal or other expenses reasonably incurred by such person in connection with investigating, defending or preparing to defend any such loss, claim, damage, liability or action; provided, however, that the Fund shall not be liable in any such case to the extent that in the final judgment of a court of competent jurisdiction such person is found to have breached this Agreement or breached any duties or responsibilities undertaken pursuant to this Agreement.

Expenses incurred defending a civil or criminal action, suit or proceeding, if requested by such person, shall be paid by the Trustees in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by such person to repay such amount plus reasonable interest in the event that in the final judgment of a court of competent jurisdiction such person is found to have breached this Agreement or any duties or responsibilities undertaken pursuant to this Agreement, and proof satisfactory to the Trustees that such person is financially capable of repaying such amount in the event it is found liable for the amount alleged as damages in the action."—Master Agreement, Article XI.

Both Equitable and VPCO submitted the above quoted indemnification provisions to the Office of Regulatory Standards and Exceptions, United States Department of Labor, on July 29, 1977 for an advisory opinion as to the legality of such provisions under ERISA. Department of Labor Opinions 77-66/67A (Reference No. C-3588A) and 77-64/65A (Reference No. C-3591A). In response, the Director, Office of Regulatory Standards and Exceptions, found that: (1) the submitted indemnification provisions did not contravene the provisions of Section 410(a) of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1110(a), relating to the voiding of provisions which purport to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under ERISA; (2) payment by the Fund pursuant to the submitted indemnification provisions in settlement of pending or threatened litigation would not be in violation of Section 410(a) of ERISA, 29 U.S.C. § 1110(a), if the Fund were to obtain a written opinion of independent legal counsel that the fiduciary in question had not breached its fiduciary obligations; (3) payment or reimbursement of expenses by the Fund pursuant to the submitted indemnification provisions was not a prohibited transaction under Section 406(a)(1)(B) and (D) of ERISA, 29 U.S.C. § 1106(a)(1)(B) & (D), as long as the reimbursement or payment did not exceed amounts allowable under Section 408(c)(2), 29 U.S.C. § 1108(c)(2); and (4) payment or reimbursement by the Fund pursuant to the submitted indemnification provisions would not contravene Section 404(a) of ERISA, 29 U.S.C. § 1104(a), as long as the payment was a reasonable expense of administering the Fund and consistent with other fiduciary duties required under ERISA. Department of Labor, Opinion 77-66/67A. Accord Department of Labor, Opinion 77-64/65A.

The Fund is opposed to the use of the Master Agreement's indemnification provisions as a model defense costs policy for all ERISA funds. However, before addressing the inadequacies and problem inherent in the Master Agreement indemnification provision, it it worth noting that such a restrictive indemnification provisions is not necessary to comply with ERISA. In *Central States, Southeast and Southwest Areas Pension Fund* v. *American National bank & Trust Co.*, No. 77 C 4335 (N.D. Ill. Oct. 26, 1979) (order granting in part and denying in part defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment), Judge Crawley reviewed certain indemnification provisions contained in contracts entered into by the Fund with six investment managers, including the following:

"The Investment Manager shall receive for its services in the Performance of this Agreement such compensation as may be agreed upon in writing from time to time by the Trustees, and the Investment Manager shall also be reimbursed for extraordinary expenses reasonably incurred by it in the performance of its duties, except that such extraordinary expenses must be approved in advance by Central States Pension Fund, which approval shall not be unreasonably withheld. The Investment Manager shall also be indemnified for all reasonably expenses, including reasonable attorney's fees, incurred by it in the course of any threatened or actual litigation or administrative proceedings pertaining to the Central States Pension Fund, provided that Central States Pension Fund is kept fully and promptly informed of any such claims and litigation, and provided that Central States Pension Fund approves such expenses, which approval shall not be unreasonably withheld."

The court found that the above-quoted indemnification provision did not violate sections 406 and 410 of ERISA, 29 U.S.C. §§ 1106, 1110, and that expenses by an investment manager pursuant to said provision were recoverable if reasonable.

It is therefore apparent that indemnification provisions that are far broader than the one found in the Master Agreement have been judicially determined to comply with ERISA. Although such a judicial determination might properly constitute an ending point for the instant analysis, this Memorandum shall nonetheless address specific problems inherent in use of the Master Agreement's indemnification provisions as a model provision for all ERISA funds.

First, the indemnification provisions incorporated in the Master Agreement are so specifically tailored to the circumstances surrounding that Agreement that when taken out of the context of their intended application to professional asset managers, their applicability to all fiduciaries of all funds would become ludicrous. As will be more fully discussed below, the clause which requires a showing of ability to repay before any payment or reimbursement can be made would constitute a particularly vexing problem to ERISA funds. Second, the indemnification provisions incorporated into the Master Agreement would inadequately protect those covered. Finally, the policy regarding settlement payment written into the indemnification provisions by DOL in the response to the request for an advisory opinion, would unnecessarily withdraw from a fund the determination (in the proper exercise of business judgment) of whether settlement payments should be expended.

The Master Agreement's indemnification provisions were specifically designed for and incorporated into a document that set forth the terms and conditions under which Equitable and VPCO become investment managers for the fund. These organizations were hired for a very specific and narrow obligation—asset management. These organizations are experts who are in the business of managing assets for a profit.

The trustees of ERISA funds and others who will be covered by any indemnificaton provisions adopted by a fund are in a radically different position. For example, the Trustees of the Fund are not experts in asset management, but rather, such individuals are simply representatives of both management and unions. In comparison to Equitable and VPCO, the Trustees do not own substantial personal assets.

Set against that background, the distinction is readily apparent between the indemnification provision which was specifically designed for the contract whereby Equitable and VPCO became professional investment managers, and a provision which is to be adopted as a general policy for all ERISA funds.

As a consequence, although the Master Agreement's indemnification provisions provide for a showing of ability to repay before any payment or reimbursement will be made, if that provision is taken out of the context of its specific application to professional asset managers, its applicability becomes ludicrous. The Master Agreement was drafted for a very specific purpose with very specific precautions due to the nature of the arrangement and the amount of assets involved. Taking the provisions of this Master Agreement out of context must either be done with extreme caution or not at all.

Before discussing the specific problems inherent in using the Master Agreement's indemnification provisions as a model for all ERISA funds, an overview of the policy underlying and the general law applicable to the indemnification of fiduciaries is necessary.

II. Policy of Legislation on Indemnification

It is uncommonly stated that the legislative policy underlying indemnification statutes is to "promote the desirable end that corporate officials will resist what they consider" unjustified suits and claims, "secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated." E. Folk, The Delaware General Corporation Law 98 (1972), quoting *Essential Enterprises Corp.* v. *Automatic Steel Products, Inc.*, 164 A.2d 437, 441 (Del. Ch. 1960). Furthermore, the larger purpose of such legislation is "to encourage capable men to serve as corporate directors, secure in the knowledge that expenses incurred by them, in upholding their honesty and integrity as directors will be borne by the corporation they serve." Id., quoting *Mooney* v. *Willys-Overland Motors, Inc.*, 204 F.2d 888, 898 (3rd Cir. 1953). See also *Merritt-Chapman & Scott Corp.* v. *Wolfson*, 264 A.2d 358, 360 (Del. 1970). Commercial entities can ill-afford to ignore their employees' concern with indemnification. In 1980, one in ten Fortune listed companies was involved in litigation seeking personal liability against a corporate fiduciary. See The 1980 Wyatt Directors and Officers Liability and Fiduciary Liability Survey 6. The average defense cost in 1980 of such claims was approximately $320,000. Id. at 12. This figure has risen from the average defense cost in 1978 of $277,549 per claim. See The 1978 Wyatt Directors and Officers Liability Survey 670. See also Comment, Corporate Indemnification of Directors and Officers: Time for a Reappraisal, 15 Mich. J.L. Ref. 101, 102 (1981); Comment, Corporate Indemnification: A View from the Director's Chair, 27 Loyola L. Rev. 89, 90 (1981). The corporate manager is faced with the ever-increasing prospect of exposure to litigation and liability of potentially disastrous proportions. This trend complicates the task of securing the most highly qualified personnel who are willing to take the risk of such liability. Without the protection of indemnification, those most qualified to serve as corporate fiduciaries will not only be recalcitrant but may avoid service to the corporation altogether. See Sebring, Symposium: Duties and Liabilities of Corporate Directors, 22 Bus. Law. 29, 124 (1966). See also Cheek, Control of Corporate Indemnification: A Proposed Statute, 22 Vand. L. Rev. 255, 274 (1969); M. Schaeftler, The Liabilities of Office: Indemnification and Insurance of Corporate Officers and Directors 218 (1976); Bishop, Sitting Ducks and Decoys: New Trends in the Indemnification of Corporate Directors and Officers, 77 Yale L. J. 1078, 1092–93 (1968).

Recognizing the importance of attracting and retaining the best persons available to manage corporations and in allowing those managers to serve secure in the knowledge that the corporation will seek to vindicate their actions, courts have repeatedly upheld corporate indemnification of fiduciaries. E.g., *Merritt-Chapman & Scott Corp* v. *Wolfson*, 321 A.2d 138, 141, (Del. 1970); *Bosch* v. *Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 363–364, 101 N.W.2d 423, 425 (1960); In re E. C. Warner Co., 232 Minn. 207, 214–15, 45 N.W.2d 388, 393 (1950); *Solimine* v. *Hollander*, 129 N.J. Eq. 264, 272, 19 A.2d 344, 348 (1941).

III. Legal Analysis of Indemnification Provisions

A. INTRODUCTION

Trustees and employees of an ERISA fund occupy a fiduciary relationship with the participants and beneficiaries of that fund. 29 U.S.C. § 1002(21)(A). Similarly, officers, directors, and agents of a corporation occupy a fiduciary relationship to the corporation and its shareholders. See generally, H. Henn, Law of Corporations § 235 *et seq.* (1970). Thus, in analyzing indemnification rights of trustees and their employees for liability brought about by acts performed on behalf of an ERISA fund, the principles which govern the right of indemnification of officers or directors of a corporation for acts done on its behalf furnishes a most appropriate analogy.

The concept of indemnification of officers and directors by the corporation for acts done on its behalf is firmly established by principles of agency law. E.g., *Bibb* v. *Allen*, 149 U.S. 481, 498 (1893). See Restatement (Second) of Agency, § 439(c) (1958). Similarly, under the common law of trusts, trustees have long enjoyed indemnification rights for litigation expenses, regardless of whether the litigation terminates favorably to the trust estate, where the trustee acted in good faith in bringing or defending litigation. See 90 C.J.S. Trusts § 284 at 411.

Most states have adopted a form of indemnification statute based upon § 5 of the Model Business Corporation Act, a type of statute which is typically known as a "Delaware prototype." [1]

Other states have followed the approach of a prior Delaware statute (the current Delaware statute now typifies a model act statute) by granting comparatively uncomplicated and purely permissive corporate power to indemnify without granting an absolute right of indemnification.[2]

Still others, such as New York, N.Y. BCL §§ 721-727 have adopted a stricter and more detailed scheme of indemnification. See also Tenn. Code Ann. §§ 48-406 to 48-411.

Finally, Connecticut, Maine, Massachusetts, and North Carolina have adopted hybrid statutes that combine elements of the above statutes.[3]

Analysis of the foregoing statutes indicates that following the revision of the Model Business Corporation Act of 1967, ABA-ALI Model Bus. Corp. Act § 5 (1967), the Delaware statute became a prototype for other states. Differences do exist among the statutes. Because analysis of the variety, nature, and scope of the rather minor differences among the various "classes" of indemnification legislation would unduly lengthen this memorandum, such differences will not be analyzed herein. Rather, the indemnification statutes of Delaware and New York will be briefly set forth and analyzed as models and later in this memorandum a proposed indemnification policy will be presented and specific provisions of this proposed indemnification policy analyzed in light of the Delaware and New York statutes.

B. DELAWARE AND NEW YORK—STATUTORY COVERAGE

1. Who may be indemnified

The substantive and procedural restrictions imposed by the New York statute upon the indemnification of directors and officers are not applicable to other corporate personnel. See N.Y. BCL § 721. Therefore, regardless of the type of action or its outcome, an employee incurring expenses in the performance of his duty may properly be indemnified by Board action or may assert a right to such indemnity under his contract of employment or the law of agency. As to officers and directors, Section 721 clearly limits the basis upon which directors or officers may be indemnified for litigation expenses to the four corners of the statute.

By its express terms, the Delaware statute is not exclusive of any other rights to which the potential indemnitee may be entitled under any by-law, agreement, vote of the stockholders or disinterested directors, or otherwise. See Del. GCL § 145(f). Though nonexclusive, the Delaware statute extends to any person who is or is threatened to be made a party to "any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative" by reason of being "a director, officer, employee or agent of the corporation" or having at its request served another enterprise in similar capacity. Del. GCL § 145(a)-(b). Although the New York statute imposes certain limitations with respect to indemnification in threatened derivative suits, it does permit full indemnity of a person threatened to be made a party to a third-party action. Compare N.Y. BCL § 722(b) with § 723(a).

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[1] See Alabama: Ala. Code § 10-2-162; Alaska: Alaska Stat. § 10.05.010; Arizona: Ariz. Rev. Stat. Ann. § 10-005; Arkansas: Ark. Stat. Ann. § 64-309; California: Cal. Corp. Code § 317; Colorado: Colo. Rev. Stat. Ann. § 7-3-101(o); Delaware: Del. Code Ann., tit. 8, § 145; Florida: Fla. Stat. § 607.014; Georgia: Ga. Code § 22-717; Hawaii: Hawaii Rev. Stat. § 416-35; Idaho: Idaho Code § 30-1-5; Illinois: Ill. Rev. Stat., ch. 32, § 157.42.12; Iowa: Iowa Code ch. 4964 § 4(19); Kansas: Kan. Stat. Ann. § 17-6305; Kentucky: Ky. Rev. Stat. Ann. ch. 271A § 025; Louisiana: La. Rev. Stat. Ann. § 12:83; Maryland: Md. Corp. & Assoc. Code Ann. § 2-418; Michigan: Mich. Comp. Laws Ann. §§ 450.1561-1565; 450.1567; 450.1569; Minnesota: Minn. Stat. § 301.095; Missouri: Mo. Rev. Stat. § 351.355; Nebraska: Neb. Rev. Stat. § 21-2004(15); Nevada: Nev. Rev. Stat. § 78.751; New Jersey: N.J. Rev. Stat. § 14A:3-5; Ohio: Ohio Rev. Code Ann. § 1701.13(E); Oklahoma: Okla. Stat., tit. 18, § 1.43a; Oregon: Ore. Rev. Stat. §§ 57.255, 57.260; Pennsylvania: Pa. Stat. Ann., tit. 15, § 1410; Rhode Island: R.I. Gen. Laws Ann. § 7-1.1-4.1; Utah: Utah Code Ann. § 16-10-4(o); Virginia: Va. Code Ann. § 13.1-3.1; Washington: Wash. Rev. Code § 23A.08.025; West Virginia: W. Va. Code Ann. § 31-1-9; Wisconsin: Wis. Stat. § 180.05; Wyoming: Wyo. Stat. Ann. § 17-1-105.1.

[2] See District of Columbia: D.C. Code Ann. § 29-904(p); Indiana: Ind. Code § 231-1-2-2(b)(9) & (10); Mississippi: Miss. Code Ann. § 79-3-7(o); Montana: Mont. Rev. Code Ann. § 35-1-108(15); New Hampshire: N.H. Rev. Stat. Ann. § 294:4(IX); New Mexico: N.M. Stat. Ann. § 53-11-4(o); North Dakota: N.D. Cent. Code § 10-19-04(15); South Carolina: S.C. Code Ann. § 33-13-180; South Dakota: S.D. Compiled Laws Ann. § 47-2-58(15); Texas: Tex. Bus. Corp. Act Art. 2.02(A)(16); Vermont: Vt. Stat. Ann., tit. 11, § 1852(15).

[3] See Connecticut: Conn. Gen. Stat. Ann. § 33-320a; Maine: Me. Rev. Stat. Ann., tit. 13-A, § 719; Massachusetts: Mass. Gen. Laws Ann., ch. 156B, § 67; New York: N.Y. Bus. Corp. L. §§ 721-727; North Carolina: N.C. Gen. Stat. §§ 55-19 through 55-21; Tennessee: Tenn. Code Ann. § 48-406 through 48-411.

Although indemnification rights of officers and directors were essentially derived from statute and were thus readily distinguishable from the non-management employees' common law rights of indemnification, these distinctions became blurred or non-existent when most Delaware prototype indemnification statutes were amended in the 1960s to cover "employees" as well as officers and directors.

2. Extent of indemnification

a. Shareholder derivative actions and actions seeking judgment in favor of the corporation

Under the New York statute, a director or officer sued in an action seeking judgment in favor of the corporation may be indemnified for his expenses "except in relation to matters as to which [he] is adjudged to have breached his duty to the corporation". N.Y. BCL § 722(a). Expenses for which indemnity is authorized do not include amounts paid in settlement of such action, or expenses incurred in defending a threatened action, or an action settled without court approval. Id. § 722b.

The Delaware statute extends indemnification to actions or suits by or in the right of the corporation to "expenses (including attorneys' fees) actually and reasonably incurred . . . in connection with the defense or settlement of such action or suit." Del. GLC § 145(b). Under the Delaware statute, in the derivative action context, there may be no indemnification "in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation." Id. § 145(b). However, even is such a case the Court of Chancery or the court in which the action was brought may "determine upon application that despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court . . . shall deem proper." Id.

b. Other actions or proceedings

If the indemnitee is involved in a proceeding not seeking judgment in favor of the corporation, indemnification under the New York statute extends not only to expenses but also to "judgments, fines [and] amounts paid in settlement." N.Y. BCL § 723(a). The Delaware statute is similar except that it adds the limitation that the expenses must be actually and resonably incurred, Del. GCL § 145(a), and specifically includes expenses incurred in administrative and investigative proceedings. Id.

3. Behavioral standards

Under the New York statute, in the shareholder derivative action context, the indemnitee may not be indemnified for expenses as to which he is adjudged to have breached his duty to the corporation. N.Y. BCL § 722(a). In other civil actions the indemnitee may be indemnified only if he "acted in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation," and, in criminal actions or proceedings, the indemnitee must additionally have had "no reasonable cause to believe that his conduct was unlawful." Id. at § 723(a). The New York statute specifically relates to employee benefit plans with the provision that assessed excise taxes shall be considered a fine and that action for a purpose reasonably believed to be in the interest of the participants and beneficiaries of the plan shall be deemed to be for a purpose not opposed to the best interests of the corporation. Id. at 723(c). Similarly, under the Delaware statute, in the derivative action context, there may be no indemnification where the indemnitee shall have been adjudged to be liable for negligence or misconduct in the performance of his duties to the corporation (with the proviso referred to above that the Court of Chancery or the court in which the action was brought may nonetheless order such indemnification). Del. GCL § 145(b). In all other actions the indemnitee must have "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and with respect to any criminal action or proceeding had not reasonable cause to believe his conduct was unlawful." Id. at § 145(a).

4. Permissive indemnification provisions, mandatory provisions, and disposition of the action or proceeding

Permissive indemnification provisions empower a corporation to indemnify corporate personnel under certain circumstances and the corporation has the discretion to adopt or not to adopt such indemnification terms in its articles of incorporation, by-laws, resolutions, or agreements. See generally, H. Henn, Law of Corporations § 380 (1970). Mandatory statutory provisions, on the other hand, impose an obligation on the corporation to indemnify under specified circumstances, and the indemnitee has a corresponding right to be indemnified. Id. The disposition of the action against the indemnitee often determines whether indemnification is permissive or mandatory.

New York's mandatory provision grants the director the right to be indemnified when he "has been wholly successful, on the merits or otherwise." N.Y. BCL § 724(a). Thus the indemnitee has no right to be indemnified if only partially successful, but does have the right if "wholly" successful, even on a merly technical ground. See J. Johnston, Corporate Indemnification and Liability Insurance for Directors and Officers, 33 Bus. Law. 1993, 2003 (1978). See also Comment, Mandatory Indemnification of Corporate Officers and Directors, 29 S.W.L.J. 727 (1975). In a case of mandatory indemnification, if the corporation refused to indemnify, the indemnitee may apply to the court, which shall grant his right to indemnity under the mandatory provision. N.Y. BCL § 725(a).

If the potential indemnitee is not wholly successful, permissive indemnification may be granted if he is found to have met the applicable standard (above) as determined by a quorum of those members of the Board of Directors who were not parties to the action, if such quorum cannot be obtained, either by the Board acting on a written opinion by independent legal counsel or by the shareholders. Id. § 724(b)(1) & (2).

Similarly, under the Delaware statute a potential indemnitee has a right to be indemnified in cases where he is "successful on the merits or otherwise." Del. GCL § 145(c). An indemnitee who is not entirely successful on the merits may nonetheless seek indemnity under the statutory language "or othewise" and have an enforceable right against the corporation to the extent that he was successful. See *Merritt-Chapman & Scott Corp.* v. *Wolfson*, 321 A.2d 138 (Del. Super. 1974). Mandatory indemnification under the Delaware statute does not require judicial approval and no standard of conduct need be met. The balance of Delaware's indemnity provisions are permissive, nonetheless, statutory (non-exclusive) indemnity may only be granted by the corporation after determination, in each specific case, that the applicable behavior standard has been met. Del. GCL § 145(d).

5. Nature of indemnification procedures

Under the New York statute, the Board of Directors may act freely in granting indemnity only where the person indemnified has been "wholly successful, on the merits or otherwise" in his defense of the relevant action or proceeding. N.Y. BCL § 724(a). Any other outcome brings the case under § 724(b) which requires, absent a court order, either:

1. A Board resolution adopted by a quorum of disinterested directors upon the finding that the person indemnified has met the relevant statutory standard of conduct; or
2. Absent such a quorum, a resolution of the Board, "upon the opinion in writing of independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct . . . has been met; or
3. A resolution of the shareholders upon a similar finding.

Under the Delaware statute a determination of indemnification can be made by:

1. A majority vote of a quorum of disinterested directors; or
2. If such a quorum so directs, or is unavailable, by independent legal counsel in a written opinion; or
3. By the stockholder.—Del. GLC § 145(d).

Additionally, under the New York statute the indemnitee is granted a judicial remedy if his corporation refuses to voluntarily indemnify him if he can establish his right to indemnification under one of the above sections. *See* N.Y. BCL § 725. Delaware and most model act states do not have a specific provision concerning the mechanism for seeking indemnity through judicial process.

6. Advancement of expenses

Both the New York and Delaware statutes specifically empower the corporation to advance the payment of reasonable litigation expenses including attorneys' fees pendente lite as are necessary for the indemnitee's defense. N.Y. BCL § 725(c); Del. GCL § 145(e). Both statutes condition the advance payment of such expenses upon the undertaking by the indemnitee that if in due course it is found that the indemnification was improper or excessive in amount, see N.Y. GCL § 726(a) or that the indemnitee is not entitled to be indemnified by the corporation, Del. GCL § 145(e), that the indemnitee will repay such amounts to the corporation. The Delaware statute grants the Board of Directors the sole power to authorize the advancement of expenses before final disposition of an action, however, the New York statute allows utilization of the same alternative procedures used for authorizing any other indemnification. See N.Y. BCL § 724(c); Del. GCL § 145(e). Similarly, the New York statute allows the court to order advance payment of such reasonable litigation expenses, including attorneys fees pendente lite, as are necessary for the indemnitee's defense. N.Y. BCL § 725(c). A court's decision to allow an advance under the New York statute appears to be contingent, however, upon a finding that the person has raised genuine issues of fact or law by his pleadings or during the course of the litigation. See *Professional Insurance Company of New York* v. *Barry*, 303 N.Y.S.2d 556, aff'd, 32 App. Div. 2d 898, 302 N.Y.S.2d 722 (1969).

IV. Problems Inherent in the Master Agreement

With this background and understanding of indemnification statutes and provisions, a thorough analysis of certain problems inherent in the Master Agreement's indemnification provisions is appropriate.

The first area of disagreement involves the payment of litigation expenses in advance of the final disposition of the action. The DOL agrees in principle that prepayment of litigation expenses is warranted under certain circumstances.[4] However, disagreement arises over the prerequisites to obtaining prepayment of expenses.

As indicated above, the position of the DOL is that the provisions of the Master Agreement requiring proof of financial ability to repay, should be incorporated into any indemnification provision to be adopted by any ERISA fund. Such a position is contrary to the purpose and policy behind indemnification provisions generally, and has no logical or legal basis.

As explained above, the purpose of an indemnification policy is to encourage fiduciaries and employees to accept positions of responsibility and to make good-faith decisions without fear of penalty. See pp. 9-11, supra. To require proof of ability to repay or security as a requisite for the advancement of expenses of litigation would frustrate this policy. Indeed, as the ability of an individual to provide security goes up, the need for the advance of expenses arguably goes down. A Terrell, Jr., Indemnification of Employees, 5 Del. J. Corp. L. 251, 266 (1980) (hereinafter "Terrell"). Keeping in mind the purpose of indemnification provisions generally, the importance of a provision providing for advanced payment of expenses prior to the final determination of the suit is apparent. Many litigants may find their assets stripped by the expenses of lengthy litigation. A litigant forced to rely on personal assets may be prevented from presenting the best case to vindicate his actions, and may eventually be forced into a consent judgment or other unfavorable compromise or settlement even though a meritorious defense exists. A policy which requires a showing of the ability to repay would not only discourage capable and upstanding persons from serving as trustees, but could lead to considerable injustice.

There being no defined or codified rules governing the payment of litigation costs and attorneys fees of fund fiduciaries, employees, or agents, other comparable areas have been examined in an effort to formulate a feasible and appealing indemnification policy. As explained above, the area found to be the most well developed and sophisticated in terms of indemnification policies is that for corporate officers and directors.

Section 5 of the Model Business Corporation Act and its counterpart in Delaware law, the Delaware Corporation Code, expressly declare that attorneys' fees and expenses may be advanced during the trial upon an undertaking by the recipient to reimburse the corporation if he is not entitled to indemnification. See ABA-ALI Model Bus. Corp. Act § 5(e) (1967); Del. GCL § 145(e). Pursuant to these provisions, advancements are permissive in that the decision to authorize advances rests with the discretion of the board of directors. While directors are presumably limited by their fiduciary duty in approving an advance, the statute does not require security for advances. If the indemnitee's financial condition is precarious and the amount of the advance is significant, it is a matter of business judgment for the board of directors to determine whether or not the expenses should be advanced. Terrell, supra at 266.

Surely if the board of directors of a corporation is empowered to terminate shareholder litigation in the exercise of its business judgment, see *Burks* v. *Lasker*, 441 U.S. 471 (1979), then it necessarily follows that the far less drastic action of determining whether litigation expenses should be advanced is committed to the discretion of the board or its appointee.

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[4] Section 408(c)(2) of ERISA, 29 U.S.C. § 1108(c)(2), and the regulations thereunder, 29 C.F.R. 2550.408c-2, provide, in pertinent part, that nothing in section 406 (which prohibits loans to fiduciaries) shall be construed to prohibit any fiduciary from receiving reasonable advances for, compensation for, or reimbursement of expenses properly and actually incurred in the performance of his duties with the plan.

A second area of disagreement with the Master Agreement's indemnification provisions lies in the standards used to determine whether the defense costs should ultimately be absorbed by an ERISA fund. The Master Agreement provision contains an extremely rigid standard which essentially provides that a fund can in no case indemnify a litigant where a court finds that the person has breached his duties or responsibilities. A recent proposal by the DOL, dated February 2, 1982, reflects the same inflexible standard by suggesting, in the case of advancing attorneys' fees, that the Fund demand full reimbursement from the litigant in any case where either a court finds that said person breached any duty or violated any law, or the litigant enters into a consent decree which either requires restitution of money or which constitutes an admission of a breach of duty or violation of any law.

The deficiency in the above provision of the Master Agreement and the comparable proposal made by the DOL is that neither provides any flexibility for tailoring the decision of whether reimbursement of indemnity is appropriate under the facts of a particular case.

Under the terms of the MBCA and the Delaware and New York statutes, the corporation may indemnify the litigant "if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceedings, had no reasonable cause to believe his conduct was unlawful." ABA-ALI Model Bus. Corp. Act § 5(a) (1967); Del. GCL § 145(a); N.Y. BCL § 723(a). Thus the litigant who loses a lawsuit based upon conduct during his employment does not lose all his rights to indemnification. The termination of any action by a finding against the employee does not, of itself, create a presumption that he did not act in good faith, and that he is therefore not qualified to indemnification under either the Delaware or New York statutes or the MBCA. Furthermore, there is a separate standard of conduct for civil criminal actions.

The MBCA and the Delaware and New York statutes reflect common law indemnification rights where the employee does not prevail in the lawsuit or proceeding. At common law an employee is not entitled to indemnification from his employer where the employee knowingly has committed an illegal or wrongful act. But, if the employee was not aware that his act was illegal, and he otherwise acted in good faith, the corporation may be bound to indemnify him for his damages. 42 C.J.S. Indemnity § 20 (1944); and Restatement (Second), of Agency § 439 (1957).

This standard of good faith is also reflected in common law trust principles, wherein the costs and expenses incurred by a trustee in necessary and proper litigation carried on a representative of and relative to the trust are payable out of the trust's estate, and not by the trustee personally. Where the trustee acted in good faith, he is not personally liable for such costs and expenses, regardless of whether the litigation terminates favorably or unfavorably to him. 90 C.J.S. Trusts, § 284.

It is logical and desirable that the Fund have some flexibility to deal with the particularities of the matters at hand, rather than apply one unvarying standard in dissimilar situations.

The third area of contention is where the litigant compromises or settles pending or threatened litigation. The position taken by the DOL would remove the decision-making function from the Trustees and place it in the hands of independent counsel. The MBCA and the Delaware and New York statutes merely require a finding of the fiduciary's good faith before allowing indemnification. See ABA-ALI Model Bus. Corp. Act § 5(a) (1967); Del. GCL § 145(a); N.Y. BCL § 723(a). The employee who settles or compromises an action related to his employment under those statutes is not deprived of an opportunity to seek indemnification. The Delaware statute, as well as the current MBCA, provides that the employee may seek indemnification for amounts paid in settlement if a disinterested board of directors makes a determination that he acted in good faith and in the best interests of a corporation, and in the case of criminal actions that the employee had no reason to believe that his conduct was unlawful. Again, this is consistent with both common law corporation and trust principles. If a disinterested quorum is not obtainable the determination is to be made by independent legal counsel. ABA-ALO Model Bus. Corp. Act § 5(a) (1967); Del. GCL § 145(a).

A requirement of good faith as determined by the Trustees would foster the purpose behind the adoption of an indemnification policy. In determining whether a settlement was reasonably incurred in connection with the suit, the Trustees could review the merits of the litigation. The Trustees could balance the probabilities of success, the possible financial exposure, the adverse impact of continuing litigation on the indemnitee and on the Fund, the costs of going forward with the action, and the multitude of factors involved in the settlement. The disinterested Trustees could meet with the indemnitee and with his counsel to discuss reasons for the settlement and their evaluation of the case. Who but the Trustees would be in a better position to make these determinations? Should the Trustees feel that they are not in a position to make the determination, they would have then available the option of seeking the opinion of independent counsel. For the above cited reasons, the Master Agreement indemnification provisions should not be utilized as a model for all ERISA funds in adopting a litigation defense costs policy.

V. The Fund's Proposal

Instead of using the Master Agreement's indemnification provisions, the following indemnification policy is proposed as a model for all ERISA funds and is one which the Fund would willingly adopt:

Litigation Defense Costs Policy

A. STATEMENT OF POLICY

1. Definition of policy coverage

The Fund shall pay costs of defense actually and reasonably incurred, including reasonable attorneys' fees, on behalf of any Covered Person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the Fund) by reason of the fact that he is or was a trustee, officer, employee, agent, or attorney for the Fund. Said defense costs shall be paid only if the Covered Person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Fund, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a pleas of nolo contendere or its equivalent, shall not, of itself, create a presumption that the covered person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the Fund, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

2. Determination of policy coverage

The Trustees shall have absolute discretion and exclusive authority to determine all questions of Policy Coverage, including determination of what are reasonable costs of defense.

3. Definition of covered persons

As used herein, "Covered Person" means and includes any former or present Trustee of the Fund and any former or present officer, employee, agent, or attorney of the Fund.

4. Exclusions

There shall be no Policy Coverage whatsoever to the extent a Covered Person has an exercisable right to obtain payment of his defense costs by insurance, by other indemnification, or by reimbursement from any third party, and the complete absence of such other coverage must be demonstrated to the satisfaction of the Trustees before any Policy Coverage will be extended.

B. CONDITIONS OF POLICY COVERAGE

1. Request for policy coverage

No Policy Coverage will be extended by the Trustees until review by them of a Request for Coverage, signed by the Covered Person, which shall be in a form approved by Fund counsel.

2. Cooperation

(a) As a condition of any Policy Coverage extended by the Trustees, the Covered Person shall cooperate with all reasonable requests by the Trustees or their authorized representatives throughout the related litigation, including any requests that may be intended to protect the interests of the Fund as related to the litigation, and including the production of requested documents or information.

(b) As a condition of any Policy Coverage extended by the Trustees, the Covered Person shall not relinquish or impair any rights or claims he may have against a third person, such as an insurance company, if such action would adversely affect the interests of the Fund.

3. Payment

Any payment of legal fees under this Policy shall be made by the Fund only as authorized in the specific case upon a determination that Policy Coverage of the Covered Person is proper in the circumstances because he has met the applicable standard of conduct set forth in paragraph A.1. above. Such determination shall be made (1) by the Board of Trustees by a majority vote of a quorum consisting of Trustees who were not parties to such action, suit, or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested Trustees so directs, by independent legal counsel in a written opinion.

4. Prepayment of fees

Expenses incurred in defending a civil or criminal action, suit, or proceeding may be paid by the Fund in advance of the final disposition of such action, suit, or proceeding as authorized by the Board of Trustees in the specific case upon receipt of a written undertaking by or on behalf of the Covered Person to repay such amount unless it shall ultimately be determined that he is entitled to have his costs of defense paid by the Fund pursuant to the terms of this Policy.

5. Subrogation

As a condition of any Policy Coverage extended by the Trustees, in the event of any payment pursuant to this Policy, the Fund shall be subrogated to the Covered Person's entire rights of recovery therefor against any person or entity, and the Covered Person shall execute requested documents and comply with all requests of the Fund in order to secure such rights, and the Covered Person shall not relinquish or impair such rights.

6. Recourse

As a condition of any Policy Coverage extended by the Trustees, the Fund shall have a right of recourse against the Covered Person (in addition to such other rights as might exist) if at the conclusion of any action, suit, or proceeding it is determined that the Covered Person is not entitled to have his cost of defense paid by the Fund pursuant to the terms of this Policy. In that event all Policy Coverage pursuant to this Policy shall then be retroactively forfeited, and the Covered Person shall then be obligated to make immediate restitution of all payments by the Fund on his behalf plus interest thereon at the prime rate for corporate borrowers as charged from time to time by the Chase Manhattan Bank, N.A., New York, New York, and the Fund shall have rights of recourse against the Covered Person for said amount.

VI. Analysis of the Fund's Proposal

A. STATEMENT OF POLICY

1. Definition of policy coverage

The Fund's proposed definition of policy coverage is an application of Del. GCL § 145(a). The Fund's proposed policy does not, however, provide a right of indemnification as broad as the permissive grant of indemnification set forth in § 145 because the Fund's proposed coverage is limited only to costs of defense actually and reasonably incurred and does not include judgments, fines, and amounts paid in settlement actually and reasonably incurred by the indemnitee in connection with such action, suit, or proceeding. The Fund's proposal is similar but more restrictive than N.Y. BCL § 723(a) in that it does not include "judgments, fines [and] amounts paid in settlement." As do the Delaware and New York statutes, the Fund's proposed definition of policy coverage negates any presumption from a judgment settlement, conviction, or plea of nolo contendere that the "good faith" standard was not met. See N.Y. BCL § 723(b), Del. GCL § 145(a). Thus, this section of the Fund's proposed policy is similar, yet more restrictive, than the vast majority of states statutes which have adopted Delaware prototype indemnification provisions to protect corporate fiduciaries from expenses incurred in the defense of actions.

2. Determination of policy coverage

Although the Fund's mechanism for determining policy coverage is discretionary and does not contain the "mandatory indemnification" provisions of most state statutes, inclusion of such a provision in the litigation defense costs policy would merely be surplusage in that a "successful" trustee or employee would automatically be entitled to indemnification under the typical model act statute were it held to apply. Furthermore, the flexibility sought by many institutions in having "discretionary indemnification" has merit. An institution is discretionary and the institution's discretion in granting indemnification may well affect an employee's conduct and degree of cooperation. See A. Terrell, Indemnification of Employees, 5 Del. J. Corp. L. 251, 261 (1980).

3. Definition of covered persons

The Fund's definition of covered person is consistent with both the common law as it existed prior to modern indemnification statutes, see 53 Am. Jur. 2d, Master-Servant § 132 (1970); Restatement (Second) of Agency §§ 438 & 439(c) (1957); *Bibb* v. *Allen*, 149 U.S. 481, 498 (1893), and with the modern statutes themselves.

4. Exclusions

This section of the Fund's litigation defense costs policy is more restrictive than either the New York or the Delaware statute. It is, however, entirely, justified in that most directors and officers liability insurance policies exclude from coverage both corporate and individual indemnification claims covered by other insurance. See Comment, Corporate Indemnification: A View from The Director's Chair, 27 Mich. J.L.R. 89, 127-33 and 133 N. 219 (1981).

B. CONDITIONS OF POLICY COVERAGE

1. Request for policy coverage

The Fund's provision for a request for policy coverage is a straightforward requirement that the potential indemnitee submit a written request for coverage to the plan. Manifestly, it is a most desirable provision.

2. Cooperation

The Fund's provision requiring reasonable cooperation by the covered person, while arguably more restrictive than the provisions of either the New York or Delaware statutes, is merely a reflection of the indemnitee's continuing obligation to act in good faith and in the best interests of the plan. The Fund's retention of its rights of subrogation is merely a restatement of its rights at common law.

3. Payment

The Fund's payment provision is a straightforward adaptation of Del. GCL § 145(d). It is also very similar to N.Y. BCL § 724(b). It omits, of course, the third alternative found in both statutes which would allow a determination to be made by a resolution of shareholders based upon a finding that the person to be indemnified has met the relevant statutory standard of conduct. The reason for such omission is self-evident.

4. Prepayment of fees

The Fund's provision for prepayment of fees is a straightforward adaptaton of Del. GCL § 145(e). It is more restrictive than the prepayment provision found in N.Y. BCL § 742(c), in that the only method of advance authorization sanctioned by the Fund is by a determination by the Board of Trustees rather than the alternative methods sanctioned by the New York statute.

Any system that does not allow advances of litigation expenses may force settlement of a case even though meritorious defenses exist. See Report of the Assembly Select Committee on the Revision of the Corporation's Code 61 (1975) (California). See also pp. 25-27, supra. Given the potentially devastating personal expenditures which might be required to defend cases brought against a covered person, see p. 10, supra, advancement of expenses is often the only vehicle which would insure vigorous defense of suits that appear to possess reasonable probability of success on behalf of the corporation and its fiduciary, and enable the organization to attract and retain quality persons capable of meeting its administrative needs.

5. Subrogation

This section, as the section on "Cooperation," is merely a restatement of the Fund's common law right of subrogation and a manifestation of its legitimate expectancy that the covered person, as a condition to indemnification, shall cooperate with the reasonable requests of the plan.

6. Recourse

The Fund's provision for a recoupment of amounts paid in indemnification, upon a determination that the covered person is not entitled to indemnification under the policy, is a clear statement of its right of recourse against a covered person who was advanced litigation expenses pursuant to an undertaking, and a recognition of the absence of legal obligation on the part of the Fund to indemnify a potential indemnitee who does not satisfy the requirements of the indemnification policy or of any mandatory indemnification provisions which might be found to exist.

VII. Conclusion

As the foregoing demonstrates, the Fund's proposed litigation defense costs policy is a reasoned adoption of indemnity principles set forth in the overwhelming majority of state statutes dealing with analogous indemnity rights and obligations. The DOL's proposals, on the other hand, would frustrate the policies underlying the principles of indemnification by unduly restricting the availability of indemnification to the fiduciary, and by denying to the Fund the exercise of its business judgment in implementing the provisions of the proposed policy. Although the DOL arguably has the power to regulate a defense costs policy by virtue of the prudent man standard set forth in Section 404 of ERISA, 29 U.S.C. § 1104, surely the legislative pronouncements of the majority of states regulating analogous indemnity powers, rights, and obligations is convincing proof that the Fund's compliance with those standards is ipso facto prudent under ERISA.

Accordingly, the Fund's proposed policy, which is in accordance with and even more restrictive than the above analogous legislative pronouncements, does not violate any provisions of ERISA.

Mr. LEHR. Equitable and Palmieri require that we reimburse their legal expenses. It is a litigation defense cost policy for trustees and independent asset managers as well as other fiduciaries.

Mr. DUNCAN. How long has Equitable and Palmieri been your asset managers?

Mr. LEHR. 1977, early October 1977.

Mr. DUNCAN. And they were involved in some of the questionable matters prior to the time that you assumed office?

Mr. LEHR. I would not term them as having been involved in those questionable matters. There have been some matters that have been brought up by individuals in regulatory and oversight groups in Washington, where they were involved. However, the matters that have been discussed here today, and if I get the meaning of your question, I do not think that Equitable and Palmieri have been involved in any of what you might call the questionable matters that have been brought up about Central States in the past.

Mr. DUNCAN. I want to thank you very much for your very frank statement, and commend you for what you are trying to do.

Mr. LEHR. Thank you, Congressman.

Chairman RANGEL. Mr. Pickle?

Mr. PICKLE. Well, Mr. Lehr, you are a fresh breath of air to this committee. We are glad to see you take on this responsibility, and we wish you well. We are led to believe that you intend to settle a lot of the misunderstanding we have had over the years, and we hope that is so.

Now, the testimony you have given us indicates to me that there is no fuss and that all we want to do is have this agreement, and you are just asking somebody to give you a piece of paper so you can sign and get this over with. And that sounds good. But I still have some questions that linger in the back of my mind.

Now, you want independent asset managers. You say you agree to that. But then you add you want a voice, the trustees want a voice; in the same breath you say that they want a voice, but they don't want to tell them what to do, how to invest. What kind of voice do you want? What are the trustees asking? What do you want in this consent agreement that you so piously ask us all to agree to?

Mr. LEHR. Mr. Congressman, there are two parts to that.

Let me first say in regard to the question of a named fiduciary, in regard to that question, the discussions we have had with the Department of Labor have been as to how the independent asset management section, including the named fiduciary, would be structured. I think we have almost no differences remaining. The only difference may be the voice that we want. We both have seen each other's language, and ours simply says that when there is a change in the mix from, for example, 40-percent equities, 40-percent debt, and 20-percent real estate, that cannot be changed, for example, to 60-percent equity, 20-percent debt, and 20-percent real estate unless it is jointly agreed to by both the independent asset manager—the named fiduciary—and the fund.

Frankly, I think that is an area that can be resolved between the Department of Labor and ourselves.

Now you make a point—why do we not just sign and leave town and all go back to doing our business. Let me try to speak frankly as to where the problem is. We want—and I will not repeat the quote from Judge Moran—we want as comprehensive a settlement as possible. We do not want to settle that single issue of just the assets, or just the assets and one or two other things, and still have the litigation.

We have agreed to bifurcate the question of the former trustees. We held strong on that for a long time. Recently, in the last 30 days, at the continuing insistence of the Department of Labor we have bifurcated that question. We have said, "OK, we will settle on a consent decree without that question being settled."

We want to resolve the questions in regard to the airplane, which the fund has had for some 16 years and the litigation that is dealing with that. We want to resolve the question regarding Indico, which is a lawsuit involving a piece of property in Florida and actions that took place I believe in either 1976 or 1977. We want that settled, and we would like the *Robbins* case settled, which involves Amalgamated and Allen Dorfman.

However, it is not the Department of Labor's problem at this time that we have not been able to talk settlement on Amalgamated because we have agreed to furnish them certain information that Merrill Lynch is working on that we have not furnished them yet. So the consent degree is not signed, in my opinion, not because of the independent asset question, but because of the question of the comprehensive nature of the consent decree. We are trying to get as much in this settlement as possible, and I in no way apologize for that, because I think we have to have a new day.

Mr. PICKLE. Mr. Lehr, again you have said, "We agree to the independent assets management. We agree with this consent decree but * * *" and you have listed at least five qualifications to it. Now you have either got an independent management setup or you do not, and you may have a lot of things that you want settled, but the one that seems to concern a lot of us is one that would allow the trustees to terminate Equitable and Palmieri with or without cause, and without the consent of labor or IRS. Is that one of the agreements?

Mr. LEHR. Congressman, I think it is safe to say that that is not a point of disagreement between ourselves and the Department of

Labor in the negotiations any longer, and I repeat I do not think the question of the asset manager——

Mr. PICKLE. Wait a minute, you are getting back on the assets managers and how much you love them. I want you to respond to my question. Is one of the contentions or one of the points that you insist on agreement on from your side one that would allow the trustees to terminate Equitable and Palmieri with or without the consent of IRS.

Is that one of your contentions?

Mr. LEHR. The last draft I saw from the Department of Labor had a provision that we will accept in that regard, and that is that if we have a consent decree, we could terminate for cause after a 60-day period, after notice to the Secretary and approval by the Court.

Mr. PICKLE. Mr. Lehr, you are asking us then to endorse, in effect, your agreement that says that you are going to have independent asset managers, but that you can cancel it with cause.

Mr. LEHR. No; this is the Department of Labor's language, Congressman, that we are agreeable to on this question.

We can cancel it with cause. However, as it is now structured, we would have to have a named fiduciary selected from one of the 25 largest banks, insurance companies, or investment houses in the country, and we could on a 60-day basis terminate with cause, or on a 6-month basis terminate without cause, only after notice to the Secretary and approval by the court, and a new asset manager must also be in place, OK?

And the new asset manager must also be one of the 25 largest of the categories I have mentioned, and I will tell you in fairness to the Department of Labor, these are discussion positions, and we have not signed off on these positions now, but that was the language of the last agreement we saw from the Department of Labor.

Mr. PICKLE. I wish that Labor was still here. It looks to me like they might want to give away the country store with this agreement. I hope you can get agreement, but if it is a qualified agreement, I wonder really what we are really after.

I get a little disturbed—Mr. Chairman, I am not going to impose on the committee—I get a little disturbed. You tell me that you are happy that this has worked out, and yet at the same time this morning's paper you said how frustrated you are in the negotiations.

Are you really frustrated, or are you just kind of disappointed or what is your position now? You give me the appearance now that everything is just fine.

Mr. LEHR. No. My quote in the paper this morning related to the fact that the Department of Labor—I was told by a member of the media—held a background briefing Friday, and said they did not think there had been any progress in the negotiations. I said I was frustrated with that statement because I think there has been significant progress in the negotiations, and in fairness to the Department of Labor, the assets section requires a named fiduciary.

When we talk about these cancellation clauses, it is all under the jurisdiction of a Federal court, so we could never not have, any time during a 10-year period, one of the 25 largest banking institutions, 25 largest insurance companies or 25 largest investment houses, and I think they have got extremely strong language in there. I do not think that is the question.

The question we are hung up on is how comprehensive will this settlement be, and frankly we want to get it as comprehensive as possible, because we want to get as close to a new day as we can, and we hope that we can settle as much as possible with the Department of Labor.

Mr. **Pickle**. Mr. Chairman, I have overgone my time.

Chairman **Rangel**. Let me follow through on your questions here, just to conclude. That offer that you say came from Labor relating to the consent decree, and the ability for you to discharge with cause involving the courts, is that not tied up with some other questions of your demands on Government concerning Alan Dorfman and the airplane case and other pension fund matters?

In other words, your agreement to Labor's offer is not a separate part of the overall agreement. You want this comprehensive agreement, and that is just one item, with other things that you say must be settled before you would sign off.

Mr. **Lehr**. That is correct, Congressman. There is draft language on the table from both sides and our position is it has to be as comprehensive as possible. What has been discussed about this point is the settlement of three other lawsuits, one of which involves Dorfman-Amalgamated. Merrill Lynch is preparing the information on that. I will be glad to explain that procedure if you so desire.

Chairman **Rangel**. What you told Mr. Pickle, what you are basically saying is that there is still an area of agreement as relates to the asset managers?

Mr. **Lehr**. That is right.

Mr. **Pickle**. But there are other areas that you have not furnished the government with sufficient material to write off on.

Mr. **Lehr**. Well, Mr. Chairman, that is true. However, if we cannot furnish that information, that should not be part of the negotiations. We have said if we cannot furnish information, then that item will be put aside from the items which are currently under discussion, temporarily, at least, until we furnish the necessary information.

The items that are currently under discussion are the Indico lawsuit in Florida, and the airplane litigation. Those are the two items on which draft language has been proposed.

Chairman **Rangel**. And until that is settled you are not prepared to sign any consent agreement?

Mr. **Lehr**. Excuse me?

Chairman **Rangel**. Until the Florida and the airplane cases are part of this comprehensive settlement, you are not now prepared to sign the consent agreement?

Mr. **Lehr**. That is correct, Congressman, and I will go back to the judge's position that we should make this as comprehensive as possible to put as much of this aside as possible. I think both of those things can be settled prior to the October 3 date.

If they are not, I am telling this subcommittee we are going to have management agreements that I think will many times over cover the requirements in the IRS determination letter. They will be much stronger agreements than are required in that letter, and I make that commitment.

Chairman **Rangel**. You say this is going to occur no matter what this committee does. You seem to be saying that there are outstanding issues; but you hope that they would be included in the comprehensive settlement. Are you saying that you are cooperating with the Government, but in the event that you are not able to really resolve these issues, that you believe that there still is a sufficient amount of agreement for you to sign the consent agreement whether or not we legislate?

Mr. **Lehr**. No, sir. What I said was the assets will be institutionalized with professional managers on October 3 even if there is not a consent decree. This will be done in a way that is much stronger than is required in the determination letter, and I make that commitment here personally today, and you can, and rightfully will, hold me personally responsible for it, and I make it on behalf of our trustees.

The consent decree is an extra step, and it is something we will live with for 10 years. When we sign that consent decree, there is going to have to be as comprehensive a settlement as possible, so that we can really get a relatively new day in regard to our pension fund.

Chairman **Rangel**. OK, but there is nothing that this committee would do, if we signed off on this legislation, that would impede the progress that you are making toward the objective?

Mr. **Lehr**. In my opinion it would not. In my opinion this legislation will not affect us, because we intend to more than live by the determination letter.

Chairman **Rangel**. Mr. Duncan.

Mr. **Duncan**. I have no further questions, Mr. Chairman.

Chairman **Rangel**. Mr. Jenkins.

Mr. **Jenkins**. Thank you, Mr. Chairman.

I appreciate your testimony, Mr. Lehr. Since I do not know anything about these cases that are pending, let me ask you two or three things concerning these.

Are these lawsuits seeking restitution from current trustees? Do they involve possible payments from current trustees to the pension fund?

Mr. **Lehr**. Potentially both of the lawsuits that we are talking about—well, all three of the lawsuits we would be talking about—would have that potential, if there was an ultimate judgment some years down the line.

Mr. **Jenkins**. So the current trustees obviously are concerned about a potential liability to the fund?

Mr. **Lehr**. Yes, sir.

Mr. **Jenkins**. And they would like to wrap these up in the same settlement that might be entered into with the Department of Labor?

Mr. **Lehr**. That is correct, Congressman.

Mr. **Jenkins**. Of course I would assume the Board of Trustees carries liability insurance, professional fiduciary liability insurance?

Mr. **Lehr**. That is correct, we do at this time.

Mr. **Jenkins**. But there is a possibility that the recovery would exceed the limits of the policies?

Mr. LEHR. That is always a possibility, Congressman, and there was a period when that insurance was not in force.

Mr. JENKINS. So it places the trustees in a very difficult position as far as their fiduciary relationship, I would assume, because if there is in fact a recovery, it would benefit the fund, but be harmful to the individual trustee.

Mr. LEHR. Congressman, there is also the question of the merits of the suits, and I will be glad to go into as much detail as you want, but one is in regard to an airplane that the fund owned for 16 years, and the question was not raised until last June.

Since that time we have said that as part of a settlement we would be willing to get rid of that aircraft, and never would an aircraft be purchased again without notice to the Secretary and approval by the court.

Mr. JENKINS. Does it involve the current trustee?

Mr. LEHR. Yes, it does.

Mr. JENKINS. Yet, that action that was taken some 16 years ago.

Mr. LEHR. Well, the current trustees have only been there for some 5 years and the airplane has been there for 16 years. There was another transaction, selling an old plane and buying a new plane in 1979, but in all those 16 years the question of prudency was never raised, and it was first raised approximately a year ago.

The second lawsuit involves a question of a piece of land down in Florida, and the actions in question took place in the transition period between the old and new trustees in 1976 or 1977. The third lawsuit involves Almagamated-Allen Dorfman, which goes back to 1955. That is when the origination of that relationship started. It has come up through the years, and then there are allegations of things that happened in recent years, so in each case I can trace this back to the roots, to past administrations also.

I think the point is there are some great arguments on our part as to the merits of these litigations. The fact is if we try them it is going to go on for several more years, and I think it is going to be hard to come up with a normal relationship with the Government during that time.

You make a point—and it is the same with any trustee of any fund in the country—that when you come to settling a question you have got your personal question as opposed to the good of the fund, but we think those questions have been taken into consideration.

Possibly we see it differently than others. Possibly we are a little bit prejudiced.

Mr. JENKINS. Is there any insistence upon the present Board of Trustees to try to settle out any potential liability of previous trustees who are not now serving?

Mr. LEHR. There absolutely is not. There had been. The Department of Labor has driven a very hard bargain in this regard. We originally thought it would be best to settle the former trustee issue, but that is no longer a condition of the negotiations.

Mr. JENKINS. So that part of it has been settled?

Mr. LEHR. It hasn't been settled, but it has been resolved from our standpoint. It is before a Federal court now.

Mr. JENKINS. Let me get to the independent asset merger question, because it appears to me from what you are saying that you and the Department are very close together on this issue. The trustees are only insisting upon two things as I understand it. One is to make a determination or have some participation in the decision as to the mix of events on an annual basis?

Mr. **Lehr**. Yes, sir.

Mr. **Jenkins**. On an annual basis?

Mr. **Lehr**. On an annual or an as-needed basis. In other words, if the named fiduciary, which would have to be one of the 75 largest organizations of its kind in the country, came to us and said, "We think it is time to change our policies to go from 40 percent equities to 65 percent equities, to allow us to go that much," that might happen. Actually, a change in investment policy, I think has happened one time in the last 5 years. It would be when it was brought up by either side, but both sides must agree. In other words, neither the trustees nor the asset manager could unilaterally do it.

Mr. **Jenkins**. I see. Now, the only other thing you are insisting upon is to have the right to discharge for cause with the approval of the court or the Government, which are you saying?

Mr. **Lehr**. Notice to the Secretary and approval by the court for cause or without cause. This consent decree is between 10 and 15 years depending on certain things that happen at the end of 10 years. We could terminate without cause with 6 months' notice to the Secretary, and approval by the court, but the court could only approve it when a new named fiduciary is in place, which also has to be one of the 25 largest of the three categories I designated.

Mr. **Jenkins**. Has the Government accepted that proposal?

Mr. **Lehr**. The Government has been very good in regard to negotiations, and I don't want to state their position in negotiations, but I am about to. Basically I don't think we have a disagreement in these areas. If we have a disagreement, it would still be over the role of the trustees in determining the mix, our say so on the mix. Without that issue we do not have a disagreement, in my opinion, but I won't try to speak for the Government.

Mr. **Jenkins**. At any rate, it has not been rejected outright?

Mr. **Lehr**. That is right.

Mr. **Jenkins**. So really the only problem that you have in coming to agreement on a consent decree is the problem with these collateral issues dealing with these three lawsuits; is that correct?

Mr. **Lehr**. The only problem we have, in my opinion, is the comprehensive nature of it. The answer to your question is yes.

Mr. **Jenkins**. There is no insistence by any of the trustees about any decision as to any possible criminal acts dealing with those three cases, is there?

Mr. **Lehr**. Absolutely not. It has never been discussed.

Mr. **Jenkins**. So the question is liability on those three issues, and if you could get those resolved, or get agreement in the consent decree, you could enter into agreement without any question.

Mr. **Lehr**. Not only could, in my opinion we should prior to October 3, and the trustees share this opinion.

Mr. **Jenkins**. I would assume that the Government has taken a position that there is possible conflict, and that they do not feel that these collateral issues ought to be in a consent decree because it could affect the fund itself.

Mr. **Lehr**. When we gave up the question of the former trustees, the Government has been willing to discuss two of the three litigation issues with us, and I think we have made substantial progress on those. They haven't been easy in discussing them but they have discussed them, and we have got certain proposals on the table.

The third issue, the Amalgamated issue—the *Robbins* case—has not been discussed because we haven't furnished the information. This is so because Merrill Lynch, Arthur Andersen, and Arthur Young, who are working on this information, have not completed it.

Mr. **Jenkins**. Why couldn't you make agreement on the collateral issues based on the outcome of the trial in those three cases?

Mr. **Lehr**. If we go to trial, we are going to spend several hundred thousand dollars more and take quite a bit more time, and that is going to continue to have a very disturbing effect on the fund for several years.

Mr. **Jenkins**. I was thinking if the trustees lose, they ought to pay individually; shouldn't they?

Mr. **Lehr**. There is no question that whatever a court ultimately ascertains is where we are going to live. These are settlement negotiations, however, and there are questions of insurance and other things involved in these settlement negotiations.

We feel—and obviously I am speaking from our side of the table—we feel that these three cases are pretty much without merit. They obviously feel otherwise. The case of the airplane, as I said, this is something that for 15 years no one said a thing about it, and suddenly said "My gosh, it's imprudent that you have an airplane."

There was also a question of how we obtained the plane, but like any lawsuit, I think we have to at some time get a new day and start from a fresh point here, and I think that is what we are trying to do. I hate to keep coming back to it, but it has gotten pretty solid concurrence from a Federal judge in Chicago who is fairly well acquainted with these issues.

Mr. **Jenkins**. Mr. Lehr, I want to thank you for your testimony. I think it has been, as Mr. Pickle said, a breath of fresh air, and I would hope that this matter would be able to reach some reasonable conclusion soon, so that you could get to the business of looking after the pension fund itself.

Thank you very much.

Mr. **Lehr**. Thank you.

Chairman **Rangel**. Mr. Moore?

Mr. **Moore**. Thank you, Mr. Chairman.

Mr. Lehr, I was a member of this subcommittee back on March 24, 1980, when we had—I guess it was the last hearings of this subcommittee on your pension fund. That was before you were on board as executive director. It was just after, I think, the Government had been ejected, and they testified they had no records, no current financial statements. Your fund was invited to testify and did not come.

In the course of those hearings, I became very, very concerned about civil lawsuits, and I will follow up on the gentleman from Georgia's questions, because I think they are akin, about civil lawsuits to be filed by the trustees against anybody that owed the fund money by virtue of some of the imprudent or improper actions in the past which were breaches of the fiduciary relationship.

It appeared to me, from the evidence we had, that there had been an awful lot of wrong things done by former trustees or executive directors or whoever, who were connected with the fund, Teamsters Union officials. And that the new trustees ought to pursue vigorously civil actions to recover those moneys to the fund, those breaches of fiduciary relationship.

Is it your opinion that that has now been done; that all possible prudent litigation or possible litigation has been filed on behalf of the trust fund to recover any and all funds which could be owed to it by virtue of breaches of fiduciary relationships?

Mr. Lehr. Congressman, in my opinion, those actions have either taken place or the time has gone by; some time ago the time has gone by. I think the alleged actions we're talking about go back to pre-1975 in most cases, and, in my opinion, which I don't expect everyone to agree with, the appropriate actions were taken or there is litigation still pending. The Department of Labor has joined that litigation where they could, and that is basically the litigation that we have agreed to step aside from.

There is a proposal before the judge now concerning settlement of the suit against the former trustees. If he does not approve that proposal we will in no way condition further negotiations with the Government on settlement of the case against the former trustees. I don't know if that answers your question.

Mr. Moore. The Department of Labor, so far as I am concerned, has no business filing lawsuits to recover funds that are due your plan. That is an indictment of the fact that your fund is not being run properly and the Government has to file those lawsuits. So my question is that since you have come on board, and we are indeed hoping you are a breath of fresh air, since you have come on board, have you undertaken through counsel for your board of trustees to determine if any and all possible litigation has been filed?

Mr. Lehr. On all matters that have been pending since we came on board, we always look at that problem. In my opinion, there is nothing that should have been done that has not been done.

Mr. Moore. So I take it you are answering my question, then, in the affirmative, that you know of no litigation that should be pursued against anybody to recover funds for breaches of fiduciary relationships to your fund?

Mr. Lehr. In my opinion, that is correct, sir.

Mr. Moore. The second question I would ask is, Are you satisfied that all the suits are being pursued in the correct manner?

Mr. Lehr. Congressman, I am not certain that there are any suits pending in that regard that haven't been settled at this time. I don't know of any suits that are still pending in regard to someone's fidiciary breach.

There was a case that was spoken of here earlier, both the criminal and civil aspects to it, and that was in regard to a former executive director or consultant to the fund, Mr. Baron, whom the Central States trustees were the ones that went to the Government and there was an indictment and conviction obtained. There was also a settlement of the civil side of that particular case with the fund.

I am not aware of any actions that are currently pending that the fund is a plaintiff in with regard to prior fiduciary breaches.

Mr. **Moore**. That is precisely the case I was going to get to. What was the amount of the settlement with Mr. Baron?

Mr. **Lehr**. Congressman, this is not necessarily an excuse, but it happened before I was there, and I am not aware of it. We have enough problems at the fund—and this is something I said in October—that I am not going to spend all my time hashing and rehashing the past. We have got to start forward some day, and that is not offered as an excuse, but maybe somewhat of a reason.

Mr. **Moore**. What concerns me is that this is the case I remembered, and staff had given us a workup of a chronological history of the problems, from the Government's point of view, that have been uncovered in dealing with your fund.

It indicates that November 23, 1981, *Central States* v. *Baron*, a case filed in Illinois, the suit was to try to recover—as a matter of fact, the court found that Mr. Baron owed the pension fund, from the information I have, over $300,000 for kickbacks, and the fund, the current trustees, agreed to dismiss the case and settle the matter for a fraction of the amount actually owed by Mr. Baron.

According to the notes here it says it is still pending. I don't know what that means but staff has given that information.

That concerns me and that is what I am getting at. Are we pursuing these suits vigorously, and are some of our new trustees still having contacts with some of the old people around and giving them preferential treatment in settling these lawsuits?

Mr. **Lehr**. Congressman, November 23 would be after I did come to the fund. I am still not totally acquainted with it. We will get you a complete report on the reason the fund did that, the reason for the settlement, the thinking behind the settlement, and you will have that delivered to all members of the subcommittee within a week.

Mr. **Moore**. I appreciate that very much, Mr. Lehr.

No further questions, Mr. Chairman.

[The information follows:]

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

EMPLOYEE TRUSTEES
LORAN W. ROBBINS
MARION M. WINSTEAD
HAROLD J. YATES
EARL L. JENNINGS, JR.

EMPLOYER TRUSTEES
HOWARD McDOUGALL
ROBERT J. BAKER
THOMAS F. O'MALLEY
R. V. PULLIAM, SR.

EXECUTIVE DIRECTOR
GEORGE W. LEHR

RECEIVED
AUG 4 1982
Ways and Means
Subcommittee on Oversight

August 2, 1982

To: The Members of the Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives
c/o Honorable Charles B. Rangel, Chairman
1102 Longworth H.O.B.
Washington, D.C. 20515

Re: 1981 Pension Fund Settlement
with Alvin Baron.

Gentlemen:

This submission relates to questions that were expressed at your hearing on July 26, 1982, about the early 1981 settlement between the Pension Fund and Alvin Baron, a former asset manager of the Pension Fund. That settlement resolved claims by the Pension Fund and its Trustees against Mr. Baron, as pressed in a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"). That civil action had been preceded by the related prosecution and conviction of Mr. Baron in United States v. Alvin Baron, No. 76 CR 1248 in the United States District Court for the Northern District of Illinois, Eastern Division (in which trial Foy Bryant and Kathy Bryant testified they had paid $200,000 cash bribes to Mr. Baron in late 1974 and early 1975).

The Settlement.

Minutes of a meeting of the Board of Trustees of the Pension Fund on December 16-17, 1980 reflect the following presentation (enclosed Item No. 80):

> "At the meeting of the Trustees on December 17, [1980] William J. Nellis reported that on December 10, 1980 counsel for Alvin Baron communicated to counsel for the Pension Fund and its Trustees a proposal for settlement of all claims against Alvin Baron in a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter 'the Baron-Bryant action'). At the same time, Mr. Nellis distributed to the Trustees for review and consideration a draft Resolution (attached 'EXHIBIT A') and provided a privileged report to the Trustees concerning the history and status of the Baron-Bryant action, anticipated rulings by United States District Judge Prentice H. Marshall on pending summary judgment motions by Alvin Baron, Foy Bryant and Kathy Bryant and the relative advantages and disadvantages of the draft Resolution, adoption of which was recommended by Mr. Nellis to the Trustees."

During the same presentation Mr. Nellis advised the Trustees that counsel for Mr. Baron had proposed settlement of the claims against Mr. Baron in exchange for $45,000 aggregate payments, spread over 5 years, by Mr. Baron to the Pension Fund. The Resolution presented to the Trustees and recommended by Mr. Nellis, and adopted by the Trustees at the same meeting (see enclosed Minutes, Item No. 80), contemplated a $67,500 settlement contribution by Mr. Baron to the

Pension Fund: $15,000 in each of the first 4 years, and $7,500 in the 5th year. By adopting the Resolution on December 17, 1980, the Trustees rejected the $45,000 settlement offer of Mr. Baron and expressed their counteroffer for a substantially greater settlement contribution ($67,500) by Mr. Baron.

Minutes of a meeting of the Board of Trustees of the Pension Fund on January 20-21, 1981 reflect the following presentation (enclosed Item No. 22):

> "On December 17, 1980 the Trustees of the Pension Fund adopted a Resolution (attached EXHIBIT A) containing a settlement counterproposal to Alvin Baron relative to the issues in a civil action (No. 78 C 3702) in the United States District Court for the Northern District of Illinois, Eastern Division. On December 18, 1980 a copy of that Resolution was delivered to Raymond J. Smith, attorney for Alvin Baron. In discussions since December 18, 1980 it has been concluded that the burden of remittance of $67,500, by Alvin Baron to the Pension Fund, within the contemplated 5-year period would be severe and might very well cause a default, but that an agreed settlement in the amount of $67,500 beneficial to the Pension Fund could be achieved if the term for payment of the additional $22,500 could be extended to a 5-year term commencing after the initial 5-year term for payment of $45,000. If the Resolution of the Trustees were thus modified (and incorporated in a mutually executed agreement protective of the interests of the Pension Fund, as contemplated by paragraph 2 of the Resolution), the settlement proceeds would be payable to the Pension Fund in accordance with the following schedule:

YEAR	AMOUNT
1981	$10,000.00
1982	10,000.00
1983	10,000.00
1984	10,000.00
1985	5,000.00
1986	4,500.00
1987	4,500.00
1988	4,500.00
1989	4,500.00
1990	4,500.00
TOTAL	$67,500.00"

Having received a recommendation of the Attorneys' Committee of the Pension Fund in favor of the modified Resolution to settle the Baron-Bryant action (for a $67,500 "restitution" settlement contribution by Mr. Baron to the Pension Fund, spread over 10 years), the Trustees adopted the modified Resolution and executed the corresponding settlement agreement on January 21, 1981, at the same meeting (see enclosed Minutes, Item No. 22). That settlement agreement, later executed by Mr. Baron, contains an automatic and non-discretionary acceleration clause upon any monetary default, as follows (emphasis added):

> "2. . . . if Baron shall at any time default in any performance of his promise set forth above in paragraph 1 of this Agreement, the entire unpaid balance of the restitution schedule shall immediately become due and payable without any notice to or demand upon Baron, and in addition Baron shall be obligated to pay to the Trustees interest on said unpaid balance at a rate of 9% per annum, commencing on the date of such default, and all expenses incurred by the Trustees in collection of said unpaid balance, including reasonable attorneys' fees."

As reflected in the enclosed Civil Docket Continuation Sheet in the Baron-Bryant action, United States District Judge Prentice H. Marshall entered an order on February 18, 1981 granting summary judgment in favor of Foy Bryant and Kathy Bryant and (by agreement) dismissing the claims against Alvin Baron with prejudice. The same Civil Docket Continuation Sheet confirms the fact that the same order, including the dismissal of claims against Mr. Baron, did not become final and appealable until May 29, 1981, a long time after actual direct notice to counsel for the Secretary of Labor about the fact and terms of the settlement between the Pension Fund and Alvin Baron.

In mid-December, 1981, Alvin Baron performed the first leg of his settlement agreement by his initial payment to the Pension Fund in the amount of $10,000. A copy of his check is enclosed.

The Late Challenge by the Secretary.

On December 1, 1981 the Secretary of Labor by his counsel filed motions asking Judge Marshall: (a) "to grant the Secretary leave to intervene as a plaintiff in this proceeding"; and (b) "to set aside its Order of February 18, 1981, dismissing defendant Alvin Baron from this action." Those motions were supported by a simultaneously filed memorandum[1] and evidentiary attachments, of which a copy is enclosed. On December 29, 1981 the Trustees of the Pension Fund filed their opposition memorandum, including an affidavit by William J. Nellis (dated December 29, 1981) and 3 exhibits, of which a copy is enclosed. On January 15, 1982 counsel for the Secretary of Labor filed a reply memorandum of which a copy is enclosed. There has been no activity in the Baron-Bryant action since January 15, 1982.

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[1] In an apparent effort to explain the long interval between notice to counsel for the Secretary of Labor (in mid-April, 1981), of the early 1981 settlement, and this first request for judicial relief, an interval exceeding 7 months, that memorandum placed much of the blame upon the Clerk of the Court (p. 13, n. 7; emphasis added): ". . . The Secretary's expeditious investigation of the settlement was hampered by several additional factors, including the haphazard condition of the pleadings file in the case; the absence of certain documents from the file; the need to secure documents from third parties, including the Pension Fund's minutes on the settlement agreement; and matters of coordination between the Solicitor's Office in Washington and the Department's Chicago office."

The timeliness of the late 1981 challenge by the Secretary of Labor to the settlement agreement between the Pension Fund and Alvin Baron can be measured in the light of a sequence of events noted in the above-described affidavit by William J. Nellis dated December 29, 1981:

> ¶3 On September 15, 1978 the Baron-Bryant action was commenced. On September 19, 1978 the Secretary of Labor received, by certified mail, a copy of the Complaint (filed September 15) in the Baron-Bryant action.
>
> ¶4 On September 18, 1978 a separate copy of the Complaint (filed September 15) in the Baron-Bryant action was mailed to counsel of record for the Secretary of Labor in Marshall (now Donovan) v. Fitzsimmons et al., No. 78 C 342 in the United States District Court for the Northern District of Illinois, Eastern Division.
>
> ¶5 Mr. Nellis ". . . participated in causing the filing in the Fitzsimmons action, and service upon counsel of record including DOL counsel, on or about April 14, 1981, of a document that disclosed the fact that '[i]n 1981, while defense summary judgment motions on grounds of release and res judicata were pending, the Pension Fund entered a settlement with Alvin Baron.'"

¶6 "On May 7, 1981 [Mr. Nellis] attended a conference in his office library with David J. Magee and DOL attorneys Bruce Rinaldi and Richard P. Carr. The time records of [Mr. Nellis] (as submitted to the Pension Fund) reflect the fact that this conference lasted 1.25 hours and describe the conference as follows:

> 'Re Donovan v. Fitzsimmons: conf. at CJN offices with R. Carr, B. Rinaldi and DJM re CSPF documents production in compliance with SDT and orders (mechanical problems, future production).'

It is the recollection of [Mr. Nellis] that this conference on May 7, 1981 was convened after reliable reports from the Pension Fund to [Mr. Nellis] and to David J. Magee that records of the Pension Fund (being produced to DOL, for microfilming, in compliance with a DOL deposition subpoena in the *Fitzsimmons* action and related protective and other orders) were being returned to the Pension Fund, after microfilming, in great disarray. It is the recollection of [Mr. Nellis] that, at the beginning of this conference on May 7, 1981, DOL counsel asked a few questions about the settlement between the Pension Fund and Alvin Baron ('the *Baron* settlement') and [Mr. Nellis] provided full answers to those questions, this part of the conference lasting several minutes. No documents were requested by DOL counsel during this conference on May 7, 1981."

¶7 Mr. Nellis ". . . has not refused or failed to provide any DOL representative any requested information or documentation about the *Baron* settlement at any time."

¶8 Mr. Nellis ". . . has not refused or failed to provide any DOL representative any requested information or documentation about orders or developments in the *Baron* action at any time."

> ¶9 "Between April 15, 1981 and November 24, 1981 [Mr. Nellis] participated in numerous telephone conversations, meetings and other activities with various DOL attorneys relative to the Pension Fund but, except for the conference [on May 7, 1981] described in paragraph 6 of this affidavit, [Mr. Nellis] can recall no questions or requests or comments in that interim, relating to the *Baron* settlement or to the *Baron* action, by any DOL attorney or other DOL representative." (¶9 also particularized the dates of and participants in some 37 "telephone conversations, meetings and other activities [by Mr. Nellis] with various DOL attorneys" in the stated 1981 time frame.)

Apart from the *timeliness* of the late 1981 challenge by the Secretary of Labor to the settlement agreement between the Pension Fund and Alvin Baron, the *merits* of that challenge (and of the *settlement* itself) can be measured in the light of the litigation status at the hour of settlement. In a ruling on August 20, 1980 (copy enclosed) Judge Marshall granted the motion of the Trustees for summary judgment against Mr. Baron, in the *Baron-Bryant* action, but denied that same motion to the extent it requested summary judgment against Foy Bryant and Kathy Bryant solely[2] because of "the Bryants' affirmative defenses of res judicata and release"

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[2] In explaining an earlier order in the *Baron-Bryant* action, Judge Marshall had stated on March 27, 1979 that ". . . when the Bryants know that he [Alvin Baron] is violating his trust, . . . the Bryants are liable to Central States, not in punitive damages, but in compensatory damages for the amount of the bribe [$200,000] that they paid to Baron" (transcript, p. 4).

(p. 3), adding that "[o]ur inclination would be to rule in favor of the Bryants on these issues but they have not sought summary judgment" (p. 5). On August 29, 1980, with permission of Judge Marshall, Mr. Baron by counsel filed in the Baron-Bryant action an Amendment to Answer, for the first time asserting the affirmative defense of release. On October 1, 1980 Mr. Baron by counsel filed a motion to vacate the order entered August 20, 1980, granting summary judgment against him. On October 10, 1980 Mr. Baron by counsel filed a motion for summary judgment in his favor, and a supporting memorandum. At and after that point in the litigation, counsel for the Trustees was required to evaluate the possibility that Judge Marshall would conclude: (1) that the Trustees had released Foy Bryant and Kathy Bryant in a 1978 transaction[3]; and

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[3] In fact Judge Marshall did ultimately reach that precise conclusion, ruling on February 18, 1981 (copy enclosed) that Victor Palmieri and Company Incorporated, as agents for the Trustees, released Foy Bryant and Kathy Bryant in the 1978 transaction (p. 7; emphasis added):

> "Finally, there is the question of the release. The agreement for settlement of litigation executed by all of the parties to this action, except Baron, provides, 'The parties desire to settle and resolve the disputes between them as evidenced by the complaint and cross-complaint and the answers thereto and to permit completion of the sale described in paragraph H above.' Various provisions were thereafter recited. We are advised that the settlement agreement has been performed. As a consequence the parties resolved 'the disputes between them' as described in the complaint, cross-complaint and answers. The cross-complaint filed by Mount Vernon and Foy Bryant and the answer thereto filed by the California cross-defendants described factually the same disputes between the parties there as exist between plaintiffs and defendants here. Those disputes have been resolved by settlement. They cannot be reasserted here."

(2) that Mr. Baron, beyond question a joint tortfeasor with Foy Bryant and Kathy Bryant in the 1974-1975 bribery scheme, was at law a third party beneficiary of the 1978 release arrangements between the Trustees and the Bryants. That second and critical possibility was central to the late 1980 and early 1981 recommendations of Fund counsel that the claims against Mr. Baron be settled. It is undisputed that Illinois law would govern the outcome upon that second point. Judge Marshall was known to be familiar with the Illinois law of release, having for instance stated in *Sears, Sucsy & Co.* v. *Insurance Company of No. Amer.*, 396 F. Supp. 820, 821 (N.D. Ill. E.D. 1975):

> "The rule in Illinois is well established that the *release of one joint tortfeasor acts as a release of all joint tortfeasors.* *City of Chicago* v. *Babcock*, 143 Ill. 358, 366, 32 N.E.2d 271, 273 (1892); *Anderson* v. *Martzke*, 131 Ill. App.2d 61, 66-67, 266 N.E.2d 137, 140-41 (1st Dist. 1970); *Tidewell* v. *Smith*, 27 Ill. App. 2d 63, 169 N.E.2d 157, 162 (2d Dist. 1960). This is a harsh and much criticized rule. See W. Prosser, *Law of Torts*, §49, at 301-305 (4th ed. 1972). Nevertheless, *Illinois law on this question must be followed*. *Aiken* v. *Insull*, 122 F.2d 746, 751 (7th Cir.), *cert. denied*, 315 U.S. 806, 62 S.Ct. 638, 86 L.Ed. 1205 (1941) *reh'g denied*, 315 U.S. 829, 62 S.Ct. 904, 86 L.Ed. 1224 (1942)."

In late 1980 and early 1981 there was no good reason to conclude that *if* (as then expected) Judge Marshall concluded that Foy Bryant and Kathy Bryant had been released in the 1978 transaction, he would disregard or reverse his own published ruling in *Sears, Sucsy* and conclude that Mr. Baron was *not* entitled to the protection of that 1978 release of his joint tortfeasors. Against a significant and imminent risk that Judge Marshall would enter the requested summary judgment in favor of Alvin Baron, Fund counsel recommended, on several occasions in late 1980 and early 1981, that the claims against Mr. Baron be settled in exchange for multi-year payments by Mr. Baron to the Pension Fund in the aggregate amount of $67,500, and the Trustees adopted those recommendations. Any objective and reasonable observer of the resulting settlement agreement between the Pension Fund and Mr. Baron, taking into account that significant risk of a final judgment in favor of Mr. Baron, can only conclude that the settlement of the claims against Mr. Baron was reasonable and fair to the Pension Fund.

Conclusion

It is fundamental trust law that a ". . . trustee can properly compromise . . . claims affecting the trust property, provided that in so doing he exercises reasonable prudence." Restatement, Second, Trusts §192. The trust agreement of the Pension Fund has long provided, and now provides, that "[t]he Trustees may, in their sole discretion, compromise or settle any claim or controversy in such manner as they think best. . ." (Art. V, §3). On August 20, 1980 Judge Marshall in his ruling (copy enclosed) had clearly expressed his "inclination . . . to rule in favor of the Bryants on . . ." the issue of a 1978 release (p. 5), in practical effect narrowing the decisive issue to an application to Mr. Baron of the ". . . rule in Illinois . . . that the release of one joint tortfeasor acts as a release of all joint tortfeasors. . . ." Sears, Sucsy, supra, 396 F. Supp. at 821. The decision of the Trustees to adopt the recommendations of Fund counsel, and to avoid the risk of an adverse judgment through a substantial monetary settlement payable to the Pension Fund, was reasonable and prudent in the circumstances then prevailing. The untimely challenge to that settlement, by the Secretary of Labor, is entirely without merit.

We are hopeful that the preceding explanation of the early 1981 settlement between the Pension Fund and Alvin Baron, which was concluded before appointment of the present Executive Director of the Pension Fund, will answer any questions you may have. If you are interested in additional details or explanation, however, we welcome your further inquiry and offer our fullest cooperation.

Very truly yours,

The Board of Trustees
of Central States, Southeast
and Southwest Areas
Pension Fund

By: George W. Lehr
George W. Lehr
Executive Director

MINUTES OF THE FULL BOARD OF TRUSTEES MEETING
DECEMBER 16-17, 1980

ITEM NO. 80

SETTLEMENT PROPOSAL BY ALVIN BARON

At the meeting of the Trustees on December 17, 1981 William J. Nellis reported that on December 10, 1980 counsel for Alvin Baron communicated to counsel for the Pension Fund and its Trustees a proposal for settlement of all claims against Alvin Baron in a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"). At the same time, Mr. Nellis distributed to the Trustees for review and consideration a draft Resolution (attached "EXHIBIT A") and provided a privileged report to the Trustees concerning the history and status of the Baron-Bryant action, anticipated rulings by United States District Judge Prentice H. Marshall on pending summary judgment motions by Alvin Baron, Foy Bryant and Kathy Bryant and the relative advantages and disadvantages of the draft Resolution, adoption of which was recommended by Mr. Nellis to the Trustees.

* *

ACTION OF THE FULL BOARD OF TRUSTEES MEETING - DECEMBER 16-17, 1980

After a full discussion, a motion was made, seconded and unanimously carried to adopt the proposed Resolution (attached "EXHIBIT A"), effective immediately.

RESOLUTION

WHEREAS, since September 15, 1978 there has been, and there is now, pending a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"); and

WHEREAS, on December 10, 1980 counsel for Alvin Baron communicated to counsel for the Pension Fund and its Trustees a proposal for settlement of all claims against Alvin Baron in the Baron-Bryant action: Alvin Baron would pay $45,000 to the Pension Fund as follows: $10,000 within one year, $10,000 within each of the following 3 years and $5,000 in the following (fifth) year; and

WHEREAS, the Trustees have examined certain relevant documents (including a Memorandum Order issued by United States District Judge Prentice H. Marshall August 20, 1980 in the Baron-Bryant action) and have received the advice and recommendation of Fund counsel in favor of adoption of this Resolution; and

WHEREAS, the Trustees have determined that adoption of this Resolution is in the best interest of the Pension Fund;

NOW, THEREFORE, IT IS HEREBY RESOLVED BY THE TRUSTEES, IN LAWFUL MEETING ASSEMBLED, AS FOLLOWS:

EXHIBIT A

1. The Trustees authorize and direct Fund counsel to communicate promptly to counsel for Alvin Baron the following counterproposal in exchange for dismissal by agreement and with prejudice (by way of a covenant not to prosecute, and not a release) of all claims against Alvin Baron in the Baron-Bryant action: Alvin Baron would pay $67,500 to the Pension Fund as follows: $15,000 within one year, $15,000 within each of the following 3 years and $7,500 in the following (fifth) year.

2. This counterproposal would be subject to formal written agreement executed by the parties, which agreement, upon approval by Fund counsel and confirmation by Fund counsel that no claims against Foy Bryant and Kathy Bryant are thereby waived or extinguished, may be executed by any Trustee on behalf of the Board of Trustees.

3. This counterproposal will expire on the earlier of 2 events (absent earlier acceptance delivered to the Pension Fund or Fund counsel in writing): January 20, 1981 or a ruling by United States District Judge Prentice H. Marshall upon a pending summary judgment motion by Alvin Baron in the Baron-Bryant action.

4. This Resolution is effective immediately.

EXHIBIT A

ITEM NO. 22

SETTLEMENT WITH ALVIN BARON

On December 17, 1980 the Trustees of the Pension Fund adopted a Resolution (attached EXHIBIT A) containing a settlement counterproposal to Alvin Baron relative to the issues in a civil action (No. 78 C 3702) in the United States District Court for the Northern District of Illinois, Eastern Division. On December 18, 1980 a copy of that Resolution was delivered to Raymond J. Smith, attorney for Alvin Baron. In discussions since December 18, 1980 it has been concluded that the burden of remittance of $67,500, by Alvin Baron to the Pension Fund, within the contemplated 5-year period would be severe and might very well cause a default, but that an agreed settlement in the amount of $67,500 beneficial to the Pension Fund could be achieved if the term for payment of the additional $22,500 could be extended to a 5-year term commencing after the initial 5-year term for payment of $45,000. If the Resolution of the Trustees were thus modified (and incorporated in a mutually executed agreement protective of the interests of the Pension Fund, as contemplated by paragraph 2 of the Resolution), the settlement proceeds would be payable to the Pension Fund in accordance with the following schedule:

YEAR	AMOUNT
1981	$10,000.00
1982	10,000.00
1983	10,000.00
1984	10,000.00
1985	5,000.00
1986	4,500.00
1987	4,500.00
1988	4,500.00
1989	4,500.00
1990	4,500.00
TOTAL	$67,500.00

MINUTES OF THE FULL BOARD OF TRUSTEES MEETING
JANUARY 20-21, 1981

ITEM NO. 22

SETTLEMENT WITH ALVIN BARON

A recommendation from the Attorneys' Committee to the Trustees is requested.

* *

ACTION OF THE ATTORNEYS' COMMITTEE MEETING - JANUARY 13, 1981

After a full discussion a motion was made, seconded and unanimously carried to recommend that the Trustees authorize and approve a modification of the Resolution adopted by the Trustees on December 17, 1980 (attached EXHIBIT A) to the extent that the $67,500 settlement proceeds would be payable to the Pension Fund in accordance with the above-described schedule, from 1981 until 1990.

* *

ACTION OF THE FULL BOARD OF TRUSTEES MEETING - JANUARY 20-21, 1981

After a full discussion, a motion was made, seconded and unanimously carried to authorize and approve a modification of the Resolution adopted by the Trustees on December 17, 1980 (attached EXHIBIT A) to the extent that the $67,500 settlement proceeds would be payable to the Pension Fund in accordance with the above-described schedule, from 1981 until 1990. (At the meeting of the Trustees on January 21, 1981, the Trustees executed an Agreement [attached "EXHIBIT B"] which was later executed by Alvin Baron, to evidence the settlement.)

RESOLUTION

WHEREAS, since September 15, 1978 there has been, and there is now, pending a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Roy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"); and

WHEREAS, on December 10, 1980 counsel for Alvin Baron communicated to counsel for the Pension Fund and its Trustees a proposal for settlement of all claims against Alvin Baron in the Baron-Bryant action: Alvin Baron would pay $45,000 to the Pension Fund as follows: $10,000 within one year, $10,000 within each of the following 3 years and $5,000 in the following (fifth) year; and

WHEREAS, the Trustees have examined certain relevant documents (including a Memorandum Order issued by United States District Judge Prentice H. Marshall August 20, 1980 in the Baron-Bryant action) and have received the advice and recommendation of Fund counsel in favor of adoption of this Resolution; and

WHEREAS, the Trustees have determined that adoption of this Resolution is in the best interest of the Pension Fund;

NOW, THEREFORE, IT IS HEREBY RESOLVED BY THE TRUSTEES, IN LAWFUL MEETING ASSEMBLED, AS FOLLOWS:

EXHIBIT A

1. The Trustees authorize and direct Fund counsel to communicate promptly to counsel for Alvin Baron the following counterproposal in exchange for dismissal by agreement and with prejudice (by way of a covenant not to prosecute, and not a release) of all claims against Alvin Baron in the Baron-Bryant action: Alvin Baron would pay $67,500 to the Pension Fund as follows: $15,000 within one year, $15,000 within each of the following 3 years and $7,500 in the following (fifth) year.

2. This counterproposal would be subject to formal written agreement executed by the parties, which agreement, upon approval by Fund counsel and confirmation by Fund counsel that no claims against Foy Bryant and Kathy Bryant are thereby waived or extinguished, may be executed by any Trustee on behalf of the Board of Trustees.

3. This counterproposal will expire on the earlier of 2 events (absent earlier acceptance delivered to the Pension Fund or Fund counsel in writing): January 20, 1981 or a ruling by United States District Judge Prentice H. Marshall upon a pending summary judgment motion by Alvin Baron in the Baron-Bryant action.

4. This Resolution is effective immediately.

EXHIBIT A

AGREEMENT

WHEREAS, since September 15, 1978 there has been, and there is now, pending a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northen District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"); and

WHEREAS, the Trustees of Central States, Southeast and Southwest Areas Pension Fund (hereinafter "the Pension Fund") and Alvin Baron (hereinafter "Baron") enter into this agreement in order to resolve all issues between plaintiffs and Baron in the Baron-Bryant action, and without any intention to resolve any issues between plaintiffs and either Foy Bryant or Kathy Bryant in the Baron-Bryant action;

IT IS HEREBY AGREED AS FOLLOWS:

1. Baron promises to pay $67,500 to the Trustees in restitution of compensation received by him on or about March 7, 1975, in accordance with the following schedule:

(a) $10,000 on or before December 31, 1981; and
(b) 10,000 on or before December 31, 1982; and
(c) 10,000 on or before December 31, 1983; and
(d) 10,000 on or before December 31, 1984; and
(e) 5,000 on or before December 31, 1985; and

EXHIBIT B

(f) 4,500 on or before December 31, 1986; and

(g) 4,500 on or before December 31, 1987; and

(h) 4,500 on or before December 31, 1988; and

(i) 4,500 on or before December 31, 1989; and

(j) 4,500 on or before December 31, 1990.

2. The Trustees promise to execute, and counsel for plaintiffs in the Baron-Bryant action is authorized to execute and file in court forthwith, a stipulation with Baron for dismissal of Baron (only) as a defendant in the Baron-Bryant action, with prejudice, subject to the following condition subsequent: if Baron shall at any time default in any performance of his promise set forth above in paragraph 1 of this Agreement, the entire unpaid balance of the restitution schedule shall immediately become due and payable without any notice to or demand upon Baron, and in addition Baron shall be obligated to pay to the Trustees interest on said unpaid balance at a rate of 9% per annum, commencing on the date of such default, and all expenses incurred by the Trustees in collection of said unpaid balance, including reasonable attorneys' fees.

3. The Trustees expressly reserve all rights of action, claims and demands against any and all persons other than Baron. The promise by the Trustees set forth in this Agreement is a covenant not to prosecute against Baron (alone) the claims that have been asserted against him in the Baron-Bryant action, and is not a release in any manner or form.

EXHIBIT B

4. The obligations of Baron created by this Agreement cannot be assigned or modified without prior formal approval of the Trustees. The obligations of Baron created by this Agreement shall be binding upon Baron, his heirs, his Estate and all beneficiaries thereof, and his legal representatives.

5. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois.

6. Any action for enforcement and/or construction and/or rescission of this Agreement, including any action for damages arising from any breach of this Agreement, shall be filed and maintained exclusively in the United States District Court for the Northen District of Illinois, Eastern Division.

Executed and entered this 21st day of January, 1981, in Chicago, Illinois.

ALVIN BARON

LORAN W. ROBBINS
Trustee

ROBERT J. BAKER
Trustee

MARION M. WINSTEAD
Trustee

HOWARD MC DOUGALL
Trustee

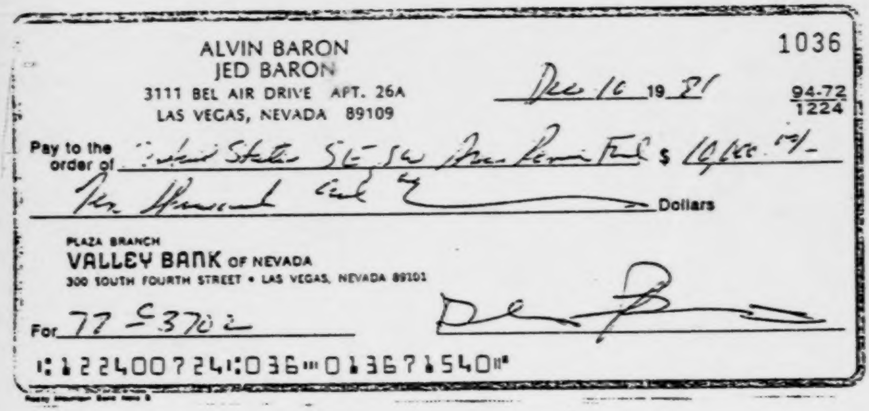
HAROLD J. YATES
Trustee

R. V. PULLIAM, SR.
Trustee

EARL L. JENNINGS, JR.
Trustee

THOMAS F. O'MALLEY
Trustee

EXHIBIT B



ALVIN BARON
JED BARON
3111 BEL AIR DRIVE APT. 26A
LAS VEGAS, NEVADA 89109

1036

Dec 16 19 81

94-72
1224

Pay to the order of United States SE-SW Area Pension Fund $ 10,000 00/-

Ten thousand and [illegible] Dollars

PLAZA BRANCH
VALLEY BANK OF NEVADA
300 SOUTH FOURTH STREET • LAS VEGAS, NEVADA 89101

For 77-C-370 [illegible]

⑆1224007241⑆036⑈0136715400⑈

													NEAREST $1,000				
752	1	78	3702	09	15	78	3	890	1				500	5227	P	78	37

PLAINTIFFS

(P-1) CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
(P-2) ROBBINS, Loran W.
(P-3) SCHLIEVE, Robert E.
(P-4) WINSTEAD, Marion M.
(P-5) YATES, Harold J. (*)
BAKER, Robert J.
McDOUGALL, Howard
O'MALLEY, Thomas F.
PULLIAM, R. V., Sr., as Trustees of CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

(*) JENNINGS, Earl L. Jr.
Plaintiff added per
First Amended Complaint 12/8/78

DEFENDANTS RD

(D-1) BARON, Alvin
(D-2) BRYANT, Foy
(D-3) BRYANT, Kathy

CAUSE

Suit to recover and to prevent loses to plaintiff pension fund resulting from breahces of fiduciary responsibilities under the "Employee Retiremen Income Security Act of 1974.

ATTORNEYS

PLAINTIFF

James L. Coghlan
William J. Nellis
Coghlan, Joyce & Nellis
One North LaSalle, Suite 4000
Chgo, IL 60602
312/346-7174

Edward J. Moran
U.S. Attorney

Richard P. Carr
U.S. Department of Labor
Office of the Solicitor
Special Litigation Task Force
P.O. Box 37296
Washington, D.C. 20013
202/523-7751

DEFENDANT

(D2, D-3)
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O'Brien and Hallisey
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415 433-5300

(D all)
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- Hough
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(D-1)
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~~53 West Jackson Blvd~~
Chicago, Ill. ~~60604~~ 60603
(312) ~~922-8980~~ - 853-3230
55 West Monroe, Suite 1800

JUDGE MARSHALL 78 C 3702

DATE	NR.	PROCEEDINGS
9-15-78		Filed Complaint and 3 copies. (JS-5)
9-15-78		Filed Civil Cover Sheet.
9-15-78		Filed Appearance of James L. Coghlan as counsel for the plaintiff with Affidavit under General Rule # 39 attached. hd
9-15-78		Filed Appearance of William J. Nellis as counsel for the plaintiff with Affidavit under Genera. Rule # 39 attached. hd
9-15-78		Issued 3 Summons with 1 copy each and with 1 copy each of the complaint. hd
10-4-78		Filed Secretary of Labor's acknowledgment of receipt of copy of the complaint. hd
10-10-78		Filed U. S. Marshal's return on service of summons returned (UNEXECUTED) as to Alvin Baron. hd
10-18-78		Filed U. S. Marshal's return on service of summons returned Executed on 10/11/78 as to Mrs. Kathy Bryant. (personal service) hd
10-18-78		Filed U. S. Marshal's return on service of Summons returned Executed on 10/11/78 as to Mr. Foy Bryant. (personal service) hd
11-6-78		Filed Appearance of Charles A. O'Brien as out of district counsel for the Defendants Foy and Kathy Bryant and re: efforst to obtain local counsel. hd
1-21-78		Enter order dated November 20, 1978: Status hearing set for December 15, 1978 at 9:30 a. m. - MARSHALL, J. Mailed ntoices 11-21-78 hd
1-29-78		Issued alias summons and 3 copies as to Alvin Baron. a
2-4-78		Filed U. S. Marshal's return on service of Summons returned Executed on 11/30/78 as to Alvin Baron via certified mail No. 982830. (Returned by Post Office marked Addressee Unknown) hd
-6-78		Filed Appearance of Donald C. Shine as counsel for the defendants with Affidavit under Gen. Rule # 39 attached. hd
2-8-78		Filed Plaintiff's Notice of Motion.
2-8-78		Filed Plaintiff's Motion for leave to file First Amended Complaint.
2-8-78		Enter order dated December 8, 1978: Plaintiffs' motion for leave to file first amended complaint, adding one plaintiff and one count granted. Defendant to answer by or on December 28, 1978. - MARSHALL, J. Mailed notices 12-8-78 hd
2-8-78		Filed Plaintiff's First Amended Complaint. hd
-8-78		Filed Defendants' Notice of Motion re: extension of time to answer, etc., with affidavit of service.
-8-78		Enter order December 8, 1978: Defendants' Foy Bryant and Kathryn Bryant granted an extension of time to answer or otherwise plead to and including January 3, 1979. Status hearing date of December 15, 1978 is reset to January 18, 1979 at 9:30 am. - MARSHALL, J. Mailed notices 12-8-78 hd

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND et al	DEFENDANT ALVIN BARON, et al	DOCKET NO 78 C PAGE 2 OF ___ PA

DATE	NR.	PROCEEDINGS
12-11-78		Issued Sumons with 1 copy and with 1 copy of the complaint as to Alvin Baron.
12-21-78		Filed U. S. Marshal's return on service of Summons(Alias) return Executed as to Alvin Baron (c/o Raymond J. Smith, Suite 615, 53 West Jackson Bld., Chicago, Ill. 60604) via -certified mail no. 982829., Executed on 11-30-78
1-2-79		Filed U. S. Marshal's return on service of Alias SUmmons returne Executed on 12-15-78 as to ALvin Baron. (personal service)
1-2-79		Filed U. S. Marshal return on service of Alias Summons returned Executed On 12-22-78as to Alvin Baron. (personal service)
1-2-79		Filed Appearance of Raymond J. Smith as counsel for the defendant Alvin Baron.
1-2-79		Filed Defendant Alvin Baron's Notice and Answer.
1-18-79		Filed 1-18-79 Defendants' Motion for leave to file instanter the Bryant defendants' motion to dismiss.
1-18-79		Filed 1-18-79 Motion to dismiss by defendants Foy Bryant and Kat Bryant.
1-18-79		Filed 1-18-79 Memorandum in support of Defendants Foy Bryant an Kathy Bryant's motion to dismiss.
1-18-79		Enter order dated January 18, 1979: Defendats Foy and Kathy Bryant granted leave to file motion to dismiss the first amende complaint, together with supporting memorandum. Answer to motio to be filed by February 20, 1979. Reply to answer to be filed March 7, 1979. Cause set for status hearing and ruling on Marc 1979 at 9:30 a. m. - MARSHALL, J. Mailed notices 1-18-79
2-13-79		Filed 2-12-79 plaintiffs' notice of filing.
2-13-79		Filed 2-12-79 plaintiffs' memorandum in opposition to dismissal motion of certain defendants.
3-8-79		FIled 3-7-79 Bryant Defendants Notice of Filing.
3-8-79		Filed 3-7-79 Reply memorandum of Defendants Foy Bryant and Kath Bryant.
3-28-79		Enter order dated March 28, 1979: Motion to dismiss by defendan Bryant denied. Plainiff granted leave to file amended complaint within 15 days. Defendant to answer 20 days thereafter. Status hearing continued to May 30, 1979 at 9:30 a. m. - MARSHALL, J. Mailed notices 3-28-79
4-3-79		Filed 4-3-79 Plaintiffs' Notice of Filing.
4-3-79		Filed 4-3-79 Plaintiffs' SECOND AMENDED COMPLAINT.

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Rev. 1/75

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO 78 C 3702
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	ALVIN BARON, et al	PAGE 3 OF ___ PAGES

DATE	NR	PROCEEDINGS
5-3-79		Filed 5-1-79 Defendant Foy and Kathy Bryant's Notice of Filing.
5-3-79		Filed 5-1-79 ANS_ER of (defendants) Foy Bryant and Kathy Bryant. hd
5-10-79		Enter order dated May 9, 1979: Status hearing set for Tuesday, May 29, 1979 at 9:45 a. m. - GRADY, J. Mailed notices 5-10-79 hd
5-11-79		Filed 5-1-79 Clerk's file copy of trnascript of proceedings had before Judge Marshal on March 27, 1979 (1 volume) hd
5-31-79		Filed 5-30-79 Defendants' notice of motion; motion of defendants Foy Bryant and Kathy Bryant to disquality Coghlan, Joyce and Nellis from representing plaintiff or, in the alternative, to dismiss Foy Bryant and Kathy Bryant.
5-31-79		Enter order dated 5-30-79, MOtion of defendants to disqualify Coghlan, Joyce and Nellis from representing plaintiff is entered and continued generally. Status hearing held. Status hearing continu-d to September 26, 1979 at 9:30 a.m. MARSHALL, J Mailed notices 5-31-79 wh
7-10-79		Filed 7-9-79, plaintiffs' notice of filing
7-10-79		Filed 7-9-79, notice of taking depositions of John Nealon and Marianne Jackson. af
7-18-79		Filed 7-17-79, Foy and Kathy Bryant's notice of filing.
7-18-79		Filed 7-17-79, interrogatories. af
9-7-79		Enter order dated September 7, 1979: Status hearing date of Septmeber 26, 1979 is reset to Septmeber 21, 1979 at 11:30 a. m. MARSHALL, J. Mailed notices 9-7-79 hd
9-21-79		Filed 9-21-79 Bryant Defendants Notice of Motion and Notice of filing.
9-21-79		Filed 9-21-79 Defendnats Foy Bryant and Kathy Bryant's Motion to transfer Venue., with Exhibits A, B, C, D, E, & F attached.
9-21-79		Enter order dated September 21, 1979: Status hearing held. Defendant to file brief in support of motion to transfer venue by September 24 1979. Answer to motion to be filed by October 9, 1979. Reply to answer to be filed bo October 16, L979. Ruling to be made by mail. Status hearing continued to December 13, L979 at 9:30 a. m. - MARSHALL, J. Mailed notices 9-21-79 hd
9-24-79		Filed 9-24-79 Defendants Foy Bryant and Kathy Bryant's Memorandum in support of motion to transfer venue. hd
10-4-79		Filed 10-3-79 Plaintiff's Notice of Motion.
10-4-79		FIled 10-3-79 Plaintiff's Motion for extension of time.
10-4-79		Enter order dated October 4, L979: Plaintiff's motion for extension of time to file brief in opposition to defendants' motion to transfe venue to October 12, 1979 , granted. - MARSHALL, J. Mailed notices 10-4-79 hd

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(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	ALVIN BARON, et al	DOCKET NO. 78 C 3 PAGE 4 OF

DATE	NR.	PROCEEDINGS
10-11-79		Enter order dated October 11, 1979; Status hearing date of December 13, 1979 is reset to December 7, 1979 at 12:00 Noon. MARSHALL, J. Mailed notices 10-11-79
10-12-79		Filed 10-12-79 Plaintiff's Notice of Filing.
10-12-79		Filed 10-12-79 Plaintiff's Memorandum in opposition to Motion t transfer venue.
10-18-79		Filed 10-17-79 Bryant defendants Reply to plaintiff's memorandu in opposition to motion to transfer venue, with Exhibt A, and Notice of Filing.
10-22-79		Enter order dated October 19, 1979: Status hearing date of Decem 7, 1979 is strkcken. Court to rule by mail on pending motion. - MARSHALL, J. Mailed notices 10-22-79
10-22-79		Filed 10-22-79 Plaintiff's Notice of Filing.
10-22-79		Filed 10-22-79 Plaintiff's Request for admissions - First set.
11-1-79		Enter order dated October 30, 1979: Defendants Foy Bryant and Ka Bryant's motion to transfer is denied until plaintiffs have the opportunity to present their motion for summary judgment. Plaint are directed to present the motion for summary judgment in open court, with supporting evidentiary materials and brief, on Friday, Novmeber 16, 1979 at 9:30 a. m. (DRAFT) - MARSHALL, J. Mailed notices 10-31-79
11-1-79		Filed 10-31-79 Plaintiff's Notice of Motion.
11-1-79		FIled 10-31-79 Plaintiff's Memorandum in support of Plaintiff's Motion for summary judgment.
11-1-79		Enter order dated Ocotber 31, 1979: Defendants to answer motion summary judgment by January 2, 1980. Reply to answer to be file by January 16, 1980. Ruling to be made by mail. - MARSHALL, J. Mailed notices 10-31-79
11-1-79		Enter order dated November 1, 1979: Status hearing date of November 16, 1979 is stricken. - MARSHALL, J. Mailed notices 11-1-79
12-26-79		Filed 12-20-79 Defendant Foy Bryant's ANSWERS to plaintiffs' request for admissions.
12-26-79		Filed 12-20-79 Defendant Kathy Bryant's ANSWERS to Plaintiffs' request for admissions.
12-26-79		Filed 12-21-79 Defendants Foy Bryant and Katy Bryant's Notice o Motion; Motion for extension ot time.
12-26-79		Enter order dated December 21, 1979: Defendants, Foy Bryant and Kathy Bryant motion for extension of time to file their answer plaintiffs' motion for summary judgment to and including Januar 1980, granted. - MARSHALL, J. Mailed notices 12-26-79

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v. 1/78

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	ALVIN BARON, et al	DOCKET NO 73 C 3702 PAGE 5 OF 5 PAGES

DATE	NR.	PROCEEDINGS
2-26-79		Filed 12-21-79 Defendants Foy and Kathy Bryants Notice of Motion; Motion to compel answers to interrogatories; , with Exhibit A Attached.
2-26-79		Enter order dated December 21, 1979: Defendants Foy Bryant and Kathy Bryant motion to compel answers to interrogatories, granted. Defendant ALvin Baron to answer interrogatories on or before January 10, 1980. - MARSHALL, J. hd Mailed notices 12-26-79
-9-80		Filed 1-4-80 Defendant Alvin Baron's Notice of motion; Motion for extension of time within which to answer motion of plaintiff for summary judgment.
-9-80		Enter order dated January 4, 1980: Motion of defendant Alvin Baron for extension of time to answer plaintiff's motion for summary judgment' to and including Janaury 16, 1980 granted. -MARSHALL, J hd Mailed notices 1-9-80
-14-80		Filed 1-11-80 Defendant Alvin Baron's Notice of Motion; Motion for an extesnion of time.
-14-80		Enter order dated Janaury 11, 1980: Defendant Alvin Baron's motion for extension of time to file objections or answers to interrogatories until January 21, 1980 granted. - MARSHALL, J. hd Mailed notices 1-14-80
-14-80		Filed 1-11-80 Clerk's file copy of transcript of proceedings had before Judge Marshall on October 31, 1979. (1 volume) hd
-22-80		Filed 1-18-80 Defendant Alvin Baron's Notice of Motion; Motion for extension of time.
-22-80		Enter order dated Janaury 21, 1980: Time for defendant ALvin Baron to respond to plaintiffs' motion for summary judgment is extended to January 23, 1980. - MARSHALL, J. hd Mailed notices 1-22-80
1-24-80		Filed 1-23-80 Defendants Foy and Kathy Bryant's Notice of Motion.
1-24-80		Filed 1-23-80 Defendants Foy and Kathy Bryant's Motion for extension of time.
1-24-80		Enter order dated January 23, 1980: Defendants Foy and Bryant motion for extension of time to file thier answer to plaintiffs' motion for summary judgment to and including Janaury 30, 1980 granted. MARSHALL, J. hd Mailed notices 1-24-80
1-24-80		Filed 1-23-80 Defendant Alvin Baron's Notice of Filing; Memorandum of defendant Alvin Baron in opposition to the Plaintiffs' motion for summary judgment. hd
1-30-80		Filed 1-29-80 Defendants Foy and Kathy Bryant's Notice of Motion; Notice of Filing. hd

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	ALVIN BARON, et al	DOCKET NO. 78 C PAGE 6 OF

DATE	NR	PROCEEDINGS
1-30-80		Filed 1-29-80 Defendants Foy Bryant and Kathy Bryant's Motion f Rule to show cause.
1-30-80		Enter order dated Janaury 29, 1980: Order ALvin Baron to file answers to interrogatories within 10 days. Oral motion of Foy Bryant and Kathy Bryant for a 21 day extension of time to answe motion for summary judgment, granted. - MARSHALL, J. Mailed notices 1-30-80
2-12-80		Filed 2-11-80 Defendant Alvin Baron's Notice of Filing; Answers to Interrogatories (of Defendants Foy & Kathy Bryant)
2-22-80		Filed 2-21-80 Defendants Foy Bryant and Katy Bryant's ANSWER to motion for summary judgment with attachments.
3-11-80		Filed 3-11-80 Plaintiffs' Notice of Motion.
3-11-80		Filed 3-11-80 Plaintiffs' Motion for leave to file reply memoran instanter.
3-11-80		Filed 3-11-80 Plaintiffs' reply memorandum in support of plainti motion for summary judgment, with Affidavit of Raymond C. Mc Cur and exhibits A, B, & C attached.
3-11-80		Enter order dated March 11, 1980: Plaintiffs' motion for leave t file reply memorandum instanter, granted. - MARSHALL, J. Mailed notices 3-11-80
4-9-80		Filed 4-8-80 Plaintiff's Notice of Motion.
4-9-80		Filed 4-8-90 Plaintiff's Motion for leave to file supplemental affidavits in support of plaintiffs' pending motion for summar judgment.
4-9-80		Enter order dated April 8, 1980: Plaintiff's motion for leave file supplemental affidavits is denied. - MARSHALL, J. Mailed notices 4-9-80
8-20-80		Enter order dated August 20, 1980: Plaintiffs' motion for summary judgment is granted as to defendant Alvin Baron in the amount of $303,427.41 and costs and is denied as to the defenda Foy Bryant and Kathy Bryant. Cause set for report on status re punitive damages and Bryants' 1404(a) motion of October 3, 1 at 11:00 a.m. (DRAFT). Marshall, J. Notices mailed 8-20-80. st
8-29-80		Filed 8-28-80 defendant Baron's notice of motion: Motion for lea to file amendment to answer instanter and amendment to answer.
8-29-80		Enter order dated 8-28-80; Motion of defendant Alvin Baron, for leave to file amendment to answer instanter,granted.-MARSHALL,J. Mailed notices 8-29-80 ij
9-8-80		Filed 9-4-80 Plaintiffs' response to memorandum order.
9-9-80		Enter order dated 9-8-80: Status hearing date of October 3, 198 reset to October 2, 1980 at 11:30 a.m.--MARSHALL, J Mld. notices 9-9-80

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CIVIL DOCKET CONTINUATION SHEET

LAINTIFF	DEFENDANT	
ENTRAL STATES, SOUTHEAST AND OUTHWEST AREAS PENSION FUND	ALVIN BARON , et al	DOCKET NO. 78 C 3702 PAGE 7 OF ____ PAGES

DATE	NR.	PROCEEDINGS
-6-80		Filed 10-1-80 Defendants' notice of motion.
-6-80		Filed 10-1-80 Defendants Foy Bryant and Kathy Bryant's motion for summary judgment: exhibits a and b.
-6-80		Filed 10-2-80 Defendant, Alvin Baron, notice of filing; notice of motion: motion to vacate the order dated August 20, 1980 granting a summary judgment as to the defendant Alvin Baron.
-6-80		Enter order dated 10-3-80: Motion of defendant Baron to vacate order dated 8-20-80 granting summary jdugment to defendant Baron is entered and continued. Defendant Baron to file motion for summary judgment with brief in support by October 9, 1980. Plaintiffs to answer Baron and Bryant on October 30, 1980. Reply to answers to be filed by November 13, 1980. Ruling to be made by amil.--MARSHALL, J Mld. notices 10-6-80 bgm
0-6-80		Filed 10-2-80 Memorandum in support of motion of defendants Foy Bryant and Kathy Bryant for summary jdugment; notice of filing. bgm
-15-80		Filed 10-10-80 Motion of the defendant Alvin Baron for summary judgment.
-15-80		Filed 10-10-80 Memorandum in support of defendant Alvin Baron's motion for summary judgment. bgm
-3-80		Filed 10-30-80 Plaintiffs' notice of motion.
-3-80		Filed 10-30-80 Plaintiffs' motion for extension of time.
-3-80		Enter order dated 10-29-80: Plaintiffs motion for extension of time to file theri consloidated reply memorandum in opposition to defendants' motion for summary judgment to and including November 6, 1980 granted.--MARSHALL, J Mld. notices 11-3-80 bgm
1-13-80		Filed 11-6-30 Plaintiffs' notice of filing.
1-13-80		Filed 11-6-80 Plaintiffs' consolidated memorandum in opposition to defendants' motions for summary judgment; Exhibits. tlc
-14-80		Filed 11-13-80 Defendants' notice of motion.
-14-80		Filed 11-13-80 Defendants' motion to set new briefing scheduled.
-14-80		Enter order dated 11-13-80: Defendants, Foy Bryant and Kathy Bryant motion for extension of time to file their reply memorandum in response to plaintiffs' consolidated reply memorandum in opposition to defendants' motion for summary judgment to November 26, 1980, granted.--MARSHALL, J Mld. notices 11-14-80 bgm
2-4-80		Filed 12-3-80 Notice of motion.
2-4-80		Filed 12-3-80 Motion of defendants Foy and Kathy for an extension of time to file reply memorandum.
2-4-80		Enter order dated 12-3-80: Motion of defendants Foy and Kathy for extension of time to file reply memorandum to and including December 9, 1980, granted.--MARSHALL, J Mld. notices 12-4-80 bgm
2-15-80		Filed 12-10-80 Reply memorandum of defendants Foy Bryant and Kathy Bryant in support of motion for summary judgment; exhibits. bgm

DC 111-
(Rev. 1-75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	ALVIN BARON, et al	DOCKET NO78_C PAGE 8 OF _ P

DATE	NR.	PROCEEDINGS
2-20-81		Enter order dated 2-18-81: The motion of defendants Foy Bryant a Kathy Bryant for summary judgment is granted. Judgment will ente favor of defendants Foy Bryant and Kathy Bryant and against plain iffs dismissing plaintiffs' action. Defendants shall have judgme for their costs. By agreement of the parties, plaintiffs' claim against defendant Alvin Baron is dismissed with prejudice and wit costs. (DRAFT)-MARSHALL-J. - RULE 58. MAILED NOTICES 2-20-81 JS-6
3-3-81		Filed 3-2-81: Defendant's Notice of Motion.
3-3-81		Filed 3-2-81: Defendant's Motion to enter and continue motion to amend judgment.
3-3-81		Enter order dated 3-2-81: Defendants Foy Bryant and Kathy Bryant granted leave to file motion to enter and continue motion to amen judgment. Motion set for status hearing on April 2, 1981 at 9:30 MARSHALL-J. MAILED NOTICES 3-3-81
4-3-81		Enter order dated 4-2-81: Status hearing held. Status hearing c tinued to April 16, 1981 at 1:30 p.m.-MARSHALL-J. MAILED NOTICES 4-3-81
4-17-81		Enter order dated 4-16-81. Status hearing held. Status hearing continued to May 1, 1981 at 9:30 a.m.-MARSHALL-J. MAILED NOTICES 4-17-81
4-30-81		Enter order dated 4-29-81: Status hearing date of May 1, 1981 is vacated and reset to May 15, 1981 at 9:30 a.m.=MARSHALL-J. MAILED NOTICES 4-30-81
5/18/81		Enter order dated 5/14/81: Hearing on plaintiffs' motion for en of final order is reset to May 22, 1981, at 9:30 a.m. --CROWELY Mailed notices 5/18/81 GJ
5-18-81		Enter order dated 5-15-81: Status hearing continued to May 26, at 9:30 a.m.-MARSHALL-J. MAILED NOTICES 5-18-81
5-27-81		Enter order dated 5-26-81: Status hearing held. Status hearing continued to May 29, 1981 at 9:30 a.m.-MARSHALL-J. MAILED NOTICES 5-27-81
6-1-81		Filed 3-2-81: Defendant's Motion to amend judment; Notice of Fi ing.
6-1-81		Enter order dated 5-29-81: By agreement the award of costs to F and Kathy Bryant is vacated. Motion for attorney fees is withdr MARSHALL-J MAILED NOTICES 6-1-81
9/18/81		Filed 9/17/81 Clerk's File Copy of the Transcript of Proceedings before theHonorable Prentice H. Marshall 10/2/80 by the official court reporter mk

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
ENTRAL STATES, ET AL	BARON,ET AL	DOCKET NO 78C3702 PAGE 9 OF ___ PAGES

DATE	NR.	PROCEEDINGS
2/1/81		Filed 12/1/81: Intervenor's Notice of Motions; Motion for the Secretary of Labor for leave to intervene; Motion of the Secretary of Labor to set aside order of dismissal; Motion of the Secretary of Labor for leave to file a memorandum in excess of 15 pages; Memorandum in Support of motions of the Secretary of Labor for Leave to intervene and to set aside order of dismissal; List of Appendices eav
.2/1/81		Enter order dated 11/30/81: The court has received the motion of the Secretary of Labor to intervene in this action and set aside dismissal, along with supporting memorandum. The Secretary's motion for leave to file a memorandum in excess of 15 pages is granted. Responses to be filed by December 28, 1981, Secretary to reply by January 11, 1982. The court will rule by mail-MARSHALL-J MLD 12/1/81 eav
2/29/81		Filed 12/29/81 Defendants Notice of Filing eav
2/29/81		Filed 12/29/81 Defendant Baron's Answer in opposition to the motions by the Secretary for orders granting leave to intervene and vacating order of dismissal eav
2/29/81		Filed 12/29/81 Plaintiffs' motion for leave to file memorandum instanter eav
2/29/81		Filed 12/29/81 Plaintiffs' memorandum in opposition to motions by the secretary for orders granting leave to intervene and vacating order of dismissal; Affidavit WILLIAM J. NELLIS; Exhibit eav
2/30/81		Enter order dated 12/29/81 Plaintiffs' motion for leave to file memorandum instanter is hereby granted.-MARSHALL-J Mailed notices 12/30/81 eav
/19/82		Filed 1/15/82 Motion of the Secretary of Labor for Leave to File Instanter eav
/19/82		Filed 1/15/82 Reply memorandum of the Secretary of Labor in Support of motions to intervene and to set aside order of dismissal eav
/19/82		Enter order dated 1/15/82 Secretary of Labor's motion for leave to file reply memorandum instanter is granted.-MARSHALL-J Mailed notices 1/19/82 eav

FILED DECEMBER 1, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

v.

ALVIN BARCN, et al.,

Defendants.

Civil Action No.
78 C 3702
(Marshall, J.)

MEMORANDUM IN SUPPORT OF MOTIONS OF THE SECRETARY OF LABOR FOR LEAVE TO INTERVENE AND TO SET ASIDE ORDER OF DISMISSAL

Secretary of Labor Raymond J. Donovan submits this memorandum in support of his motions, filed pursuant to Rule 24(a) and (b) and Rule 60(b), Fed. R. Civ. P., which seek leave to intervene in this proceeding and request the Court to set aside its order of dismissal as to defendant Alvin Baron. The order of dismissal, entered on February 18, 1981, nullified a prior order of this Court, granting summary judgment in favor of plaintiffs and holding defendant Baron liable to plaintiff Pension Fund in the amount of $303,427.41, plus costs. Instead, the parties voluntarily settled the case (for less than 25% of the amount awarded in the Court's order), without any apparent legal basis for the compromise and without any discovery or investigation relating to Mr. Baron's assets.

Because the settlement agreement resulted from either mistake, neglect, or questionable conduct on the part of plaintiff trustees, and because the settlement appears contrary to the fiduciary provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., the Secretary formally requests that he be permitted to intervene in this case, that the order of dismissal be set aside, and that proceedings in the case be reopened.

INTRODUCTION

A. Prior Proceedings in the Case

To appreciate the present motions filed by the Secretary of Labor, it is necessary to recount in some detail the prior procedural history of this case. The complaint was filed on September 15, 1978. Plaintiffs included the Teamsters Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") and the eight incumbent trustees of the Pension Fund. Defendants were Alvin Baron, the former asset manager of the Pension Fund; Foy Bryant, president and principal shareholder of Mt. Vernon Memorial Park, a California corporation which, between 1964 and 1974, borrowed approximately $2.87 million from the Pension Fund; and Kathy Bryant, the wife of Foy Bryant.

The original complaint alleged that defendants engaged in a kickback scheme in early 1975, involving $200,000 in Pension Fund loan proceeds. Relying upon ERISA, as well as common law trust principles, plaintiffs sought reimbursement of some $100,000 in compensation and severance pay granted to defendant Baron between January 2, 1975 and March 15, 1975, when Baron resigned as asset manager of the Pension Fund. Plaintiffs amended, and re-amended, the complaint on December 8, 1978 and April 3, 1979, respectively, to additionally seek restitution of $200,000 in kickback sums, paid to defendant Baron by the Bryants. 1/

Plaintiffs moved for summary judgment against defendant Baron, arguing that Baron's criminal conviction arising out of kickback payments precluded him from relitigating the same issue in the present action. On August 20, 1980, the Court issued a Memorandum Order (Appendix A, attached) granting plaintiffs' motion as to defendant Baron:

> [W]e can and do grant plaintiffs' motion [for summary judgment] with respect to the defendant Alvin Baron....
>
> Baron has been prosecuted and convicted in this district of unlawfully receiving the $200,000 kickback which is the subject of this action. That conviction has been affirmed, the judgment is final, and it precludes Baron from relitigating the same issues here. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Baron's assertion that he is entitled to relitigate the question of who got the money or whether Bryant's claim that he paid Baron the money was an income tax dodge collides directly with the very purposes of the doctrine of collateral estoppel. The consequences of

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1/ Defendant Baron was convicted on June 30, 1978 of wire fraud, soliciting bribes, and filing a false income tax return -- all in connection with his unlawful receipt of $200,000 in kickback payments from defendant Foy Bryant. The appeal was subsequently affirmed, see United States v. Baron, 602 F.2d 1248 (7th Cir. 1979), and certiorari was denied, 444 U.S. 967 (1979).

> Baron's breach of trust are indisputable: he forfeits his right of compensation during the period of his treachery and he accounts to his principal, the Fund, for his ill-gotten gain. Accordingly, plaintiffs' motion for summary judgment against Alvin Baron is granted; partial summary judgment will enter in favor of plaintiffs and against the defendant in the amount of $303,427.41 and costs. Plaintiffs are directed to advise the court within 15 days as to whether they wish to press the question of punitive damages. If they do not, a finding pursuant to Rule 54(b), F.R.Civ.P., will be made and the Clerk will be directed to enter a final judgment in favor of the plaintiffs and against the defendant Baron in the aforesaid amount.

Memorandum Order of August 20, 1980, at 2-3.

Although the Court in its Order found for plaintiffs and against defendant Baron, in the full amount sought in the amended complaint, the Court went on to consider plaintiffs' separate claim against the Bryants. The Court found that these defendants, by initiating and making kickback payments, were "participants. . .in a breach of trust." Id. at 3. However, because of the affirmative defenses of res judicata and release which were available and properly asserted by the Bryants, the Court denied plaintiffs' motion for summary judgment as to the Bryants. [2]

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[2] As noted in the Court's Memorandum Order the Pension Fund, in separate litigation instituted in 1976 in California state court, sued Mt. Vernon Memorial Park and the Byrants to enforce various promissory notes and to foreclose upon the deed of trust securing the notes. The Bryants counterclaimed against the Pension Fund and Baron (who was never served), asserting that the kickback payments to Baron constituted illegal, usurious charges under California's usury statute.
(footnote cont'd)

Plaintiff trustees, pursuant to the Court's instruction in its Memorandum Order, advised the Court that they would not press their remaining claim for punitive and exemplary damages against defendant Baron. See Plaintiffs' Response to Memorandum Order, filed September 4, 1980. Defendant Baron, for his part, moved to amend his answer and moved to vacate the Court's Memorandum Order; he also filed a motion for summary judgment, based upon the Pension Fund's prior settlement and release of the Bryants in separate litigation between the parties. See Defendant Baron's Motion to Amend, filed August 28, 1980; Motion to Vacate, filed October 2, 1980; Motion for Summary Judgment, filed October 10, 1980. Baron's main contention in his papers was as follows:

> The general common law rule is that a valid release of one joint tortfeasor is also a release of all other joint tortfeasors, and is a bar against a civil action against any of them for the same wrong, because an injured person is entitled to but one satisfaction from whatever source, and because a release operates to extinguish the cause of action.
>
> * * * * *

(Footnote cont'd)

The Pension Fund replied to the counterclaim by raising a number of affirmative defenses, but did not seek recovery from the Bryants of the $200,000 in kickback amounts.

Eventually, the Pension Fund and the Bryants settled the state court case, resolving all disputes and exchanging mutual releases as to claims raised in the complaint, counterclaim, and reply. See Memorandum Order of August 20, 1980, at 3-4. Baron was not a party to the settlement. The present action by the Pension Fund against the Bryants and Baron was filed on September 15, 1978, one day after execution of the settlement and release agreement.

> In the instant case, the plaintiffs were parties to litigation [with the Bryants] in California relative to which they ultimately sought to settle and resolve the disputes between them.... The resolution of the dispute between them, including the issue as to the $200,000.00 loan fee, was a release of one of some of the alleged joint tortfeasors, the Bryants, and as such operated as a release of the other alleged joint tortfeasor, defendant Alvin Baron, as well.

Memorandum in Support of Defendant Baron's Motion for Summary Judgment, at 4, 6.

Plaintiff trustees opposed defendant Baron's motion for summary judgment, as well as the Bryants' separate motion for summary judgment, which relied upon the twin defenses of res judicata and release. See Plaintiffs' Consolidated Memorandum in Opposition, filed November 6, 1980. In spite of their well-founded opposition to Baron's motion and, equally significantly, in spite of the Court's crystal-clear opinion finding in their favor and ERISA's policy of personal, individual liability, see ERISA § 409(a), 29 U.S.C. § 1109(a), plaintiff trustees proceeded to settle their claim against Baron. The minutes of the trustees' January 20-21, 1981 meeting (Appendix B, attached) reflect the following discussion and action on the settlement:

> On December 17, 1980 the Trustees of the Pension Fund adopted a Resolution (attached EXHIBIT A) containing a settlement counterproposal to Alvin Baron

relative to the issues in a civil action (No. 78 C 3702) in the United States District Court for the Northern District of Illinois, Eastern Division. On December 18, 1980 a copy of that Resolution was delivered to Raymond J. Smith, attorney for Alvin Baron. In discussions since December 18, 1980 it has been concluded that the burden of remittance of $67,500, by Alvin Baron to the Pension Fund, within the contemplated 5-year period would be severe and might very well cause a default, but that an agreed settlement in the amount of $67,500 beneficial to the Pension Fund could be achieved if the term for payment of the additional $22,500 could be extended to a 5-year term commencing after the initial 5-year term for payment of $45,000. If the Resolution of the Trustees were thus modified (and incorporated in a mutually executed agreement protective of the interests of the Pension Fund, as contemplated by paragraph 2 of the Resolution), the settlement proceeds would be payable to the Pension Fund in acordance with the following schedule:

YEAR	AMOUNT
1981	$10,000.00
1982	10,000.00
1983	10,000.00
1984	10,000.00
1985	5,000.00
1986	4,500.00
1987	4,500.00
1988	4,500.00
1989	4,500.00
1990	4,500.00
Total	$67,500.00

* * * * *

After a full discussion, a motion was made, seconded and unanimously carried to authorize and approve a modification of the Resolution adopted by the Trustees on December 17, 1980 (attached EXHIBIT A) to

> the extent that the $67,500 settlement proceeds would be payable to the Pension Fund in accordance with the above-described schedule, from 1981 until 1990. (At the meeting of the Trustees on January 21, 1981, the Trustees executed an Agreement [attached "EXHIBIT B"] which was later executed by Alvin Baron, to evidence the settlement.)

This Court was subsequently apprised of the settlement between plaintiff trustees and defendant Baron, although no filing on the matter is reflected in the record. 3/ In a Memorandum Order issued on February 18, 1981 (Appendix C, attached), the Court noted that, since its earlier order finding Baron liable to plaintiffs in the amount of over $300,000, "[P]laintiffs and defendant Alvin Baron have settled their aspect of this controversy. . . ." Memorandum Order of February 18, 1981, at 1. The Court went on to grant the Bryants' motion for summary judgment, based upon their contentions of res judicata and release. As to defendant Baron, the Court concluded, "By agreement of the parties plaintiffs' claim against defendant Alvin Baron is dismissed with prejudice and without costs." Id. at 8. This concluded litigation in the case and, following certain delays, an amended judgment was entered on June 1, 1981.

3/ It is not clear whether the Court was ever informed of the specific terms of the settlement agreement between plaintiff trustees and defendant Baron.

B. The Secretary's Interest in This Proceeding

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, is a comprehensive remedial statute designed to protect the interests of participants and beneficiaries in pension and welfare benefit plans, and to preserve the integrity of plan assets. 4/ Included in ERISA's provisions are uniform, nationally applicable standards for the administration of private sector employee pension and welfare benefit plans. The Secretary of Labor is charged with administering and enforcing the fiduciary sections of ERISA. Pursuant to ERISA § 502, 29 U.S.C. § 1132, the Secretary of Labor (as well as any plan participant, beneficiary, or fiduciary) may sue to enforce compliance with ERISA and, additionally, may seek personal liability against a plan fiduciary who breaches his trust obligations under ERISA.

The Secretary of Labor filed suit under ERISA § 502 in February 1978 against certain former officials of the Pension Fund, including defendant Alvin Baron. *Donovan* v. *Fitzsimmons*, No. 78 C 342 (N.D. Ill.; Moran, J.). The complaint alleges that defendants grossly mismanaged investments and assets of the Pension Fund, in violation of their fiduciary responsibilities under ERISA. The complaint

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4/ *Eaves* v. *Penn*, 587 2d 453, 457 (10th Cir. 1978); *see* ERISA § 2, 29 U.S.C. § 1001 (Congressional findings and declaration of policy); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-62 & n.1 (1980).

sets forth, as examples of defendants' imprudence and misconduct, a number of specific loans and other transactions.

Two of the transactions in the Donovan v. Fitzsimmons complaint bear directly upon the allegations involved in the present lawsuit. In fact, it can be assumed that plaintiff trustees initiated the present litigation as a result of the Secretary's claims in Fitzsimmons. In paragraph 6(m) and (o) of the complaint, the Secretary asserted:

> In March 1975, the defendants caused a large sum of money in the nature of a gratuity to be paid out of plan assets to defendant Alvin Baron, who had, prior to such payment, been fully compensated for his employment by the plan, and who had no legal claim or entitlement to such payment from the plan.
>
> * * * * *
>
> Beginning at sometime after January 1, 1975 and continuing thereafter, defendant trustees failed to take steps to require defendant Alvin Baron to restore to the plan a large sum of money unlawfully paid to him in connection with a loan from the plan to the Mount Vernon Memorial Park, Inc., of Fair Oaks, California [,whose principal was Foy Bryant]. Defendant Baron, for his part, failed to make restitution of these diverted funds.

The Secretary has obtained Pension Fund records substantiating these claims in the Fitzsimmons case. Court documents and rulings relating to Mr. Baron's criminal conviction, of course, are also available. See note 1, supra. However, the Secretary deferred further discovery and action based upon the view that the present litigation by the Pension

Fund against Mr. Baron would be vigorously prosecuted, and would result in partial or total restitution to the Pension Fund of whatever losses it sustained from the Baron matters. [5]

As indicated in the attached Affidavit of Bruce Rinaldi (Appendix D), the Secretary learned of the settlement of the Pension Fund's claims against Mr. Baron entirely after the fact, through an unrelated discovery filing in Donovan v. Fitzsimmons. Rinaldi Affidvait, ¶ 6. [6] On April 14, 1981 the Pension Fund advised, in a memorandum setting forth the status of various collateral litigation, that it had settled its lawsuit against defendant Baron. The pleading stated:

> On September 15, 1978 the Pension Fund commenced an action for damages entitled Central States Pension Fund et al. v. Baron et al., No. 78 C 3702 now pending before this Court, contending *inter alia* that Alvin Baron intentionally breached fiduciary responsibilities owed to the Pension Fund and that other defendants knowingly participated in that

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[5] It should be emphasized that recovery of losses by the Pension Fund in the present case will not "moot" the Secretary's claims in Donovan v. Fitzsimmons relating to the Baron payments. Rather, since the Fitzsimmons claims focus upon defendant former trustees' imprudent actions, any recoupment in this case will work to mitigate losses, rather than to resolve or moot the Secretary's imprudence claims.

[6] This Circuit in Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 793 (7th Cir. 1980), emphasized that affidavits submitted in support of a Rule 60(b) motion may be considered by the district court "for whatever evidentiary value they might possess." Id. at 797.

> wrongful conduct. In 1981, while defense summary judgment motions on grounds of release and res judicata were pending, the Pension Fund entered a settlement with Alvin Baron. On February 18, 1981 United States District Judge Prentice H. Marshall (in the course of an 8-page opinion) granted the other defense summary judgment motions.

Rinaldi Affidavit, ¶ 6.

Counsel for the Secretary immediately undertook to determine the terms of the settlement, since settlement of this action might have a significant effect upon the Secretary's recoupment in Fitzsimmons, and also in view of the Secretary's overall ERISA responsibilities. Rinaldi Affidavit, ¶ 7. Upon being advised that no court order or pleading contained the settlement terms, counsel for the Secretary met with counsel for the Pension Fund in May 1981, and made inquiry about the nature and terms of the settlement. Counsel were advised that: (a) the Baron case had been settled against Mr. Baron for approximately $67,000, to be paid over a 10-year period; (b) there had been little or no investigation, and no discovery, into Mr. Baron's assets or ability to pay a larger judgment; and (c) the settlement was motivated by plaintiffs' concern that, under defendants' release and joint tortfeasor contentions, Mr. Baron might be able to obtain dismissal from the case, based upon the Pension Fund's settlement and release of the Bryants in earlier litigation. Counsel for the Pension Fund did not indicate that, at the time the case was settled, summary judgment in excess of $300,000 had been ordered against Baron and in favor of the Pension Fund. Rinaldi Affidavit, ¶¶ 8-9. 7/

The Secretary has since obtained and reviewed the pleadings in this case, and also investigated various aspects of the settlement. Based upon this investigation, the Secretary submits, as more fully discussed within, that:

1. ERISA § 409(a), 29 U.S.C. § 1109(a), holds fiduciaries jointly and severally liable for losses incurred by a pension plan -- contrary to whatever common law tort theories the parties cited or relied upon. Additionally, ERISA § 514(a), 29 U.S.C. § 1144(a), preempts all state and common law doctrines in cases arising under ERISA.

2. Even assuming the applicability of common law principles, the Pension Fund's release of the Bryants did not operate to release Baron. The parties did not intend that Baron be released. And, Baron's breach of trust against the Pension Fund was separate and divisible from that of the Bryants.

7/ Not until late October 1981 did counsel for the Secretary learn, from the pleadings in the Baron case, that judgment exceeding $300,000 had already been ordered, but not entered, by the Court; and that settlement was consummated during the pendency of a motion to vacate the Court's order finding Mr. Baron liable in full to the Pension Fund. Rinaldi Affidavit, ¶¶ 9, 11.

The Secretary's expeditious investigation of the settlement was hampered by several additional factors, including the haphazard condition of the pleadings file in the case; the absence of certain documents from the file; the need to secure documents from third parties, including the Pension Fund's minutes on the settlement agreement; and matters of coordination between the Solicitor's Office in Washington and the Department's Chicago office. Id. ¶ 10.

3. The Court's Memorandum Order of August 20, 1980 implicitly rejected the "release of joint tortfeasors" argument pressed by defendant Baron upon reconsideration. This argument was apparently instrumental in causing plaintiff trustees to settle the case with Mr. Baron for less than 25% of what the Court awarded in its August 1980 order.

4. Wholly apart from any legal theories, plaintiff trustees apparently failed to determine what assets Mr. Baron possessed or what ability he had to pay a $300,000 judgment, prior to settling the case for $67,500 over 10 years.

5. Settlement of this case for the amount and upon the terms agreed upon may violate ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B). The settlement does not seem to be in the interest of, or for the exclusive benefit of, the Pension Fund's 500,000 participants and beneficiaries. And, the settlement does not appear to be the course of conduct which a "prudent man" acting in like circumstances would have undertaken.

For these reasons and for the reasons set forth within, the Secretary of Labor urges the Court to grant him leave to intervene as a plaintiff in this case, to set aside the consent judgment and dismissal of defendant Baron, and to reopen the case for further proceedings.

ARGUMENT

I. The Secretary of Labor Should be Granted Leave to Intervene in This Proceeding

A. Intervention is Proper Under Rule 24(a)-(b)

As an initial procedural matter, the Secretary seeks leave to intervene in this action in order to file a motion under Rule 60(b), Fed. R. Civ. P. The Secretary's intervention is proper under Rule 24(a), Fed. R. Civ. P., governing intervention as of right, as well as under Rule 24(b), dealing with permissive intervention. Intervention is appropriate -- indeed, compelled -- under a consistent line of cases calling for a liberal construction of Rule 24, 8/ even in instances where a final order or consent judgment has been entered. 9/ Accordingly, the Secretary's motion to intervene should be granted.

Rule 24(a), Fed. R. Civ. P., provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1)

8/ *E.g.*, *Clark* v. *Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953) ("Rule [24] should be liberally construed, in order to avoid multiplicity of suits and settle all related controversies in one action"); *Greer* v. *Blum*, 462 F. Supp. 619, 625 (S.D.N.Y. 1978); *Davis* v. *Smith*, 431 F. Supp. 1206, 1209 (S.D.N.Y. 1977), *vacated on other grounds*, 607 F.2d 540 (2d Cir. 1978); 7A Wright & Miller, Federal Practice and Procedure § 1904 (1972).

9/ *E.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-96 & cases cited in n.16 (1977); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 506-08 (1941) (private party permitted to intervene to enforce consent decree); 7A Wright & Miller, Federal Practice and Procedure § 1916, at 582 (1972)("in a significant number of cases intervention has been allowed even after judgment"). *Cf.* *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976), *aff'd*, 432 U.S. 385 (1977) ("members may rely on the champion of the class until he or she abdicates").

> when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Focusing upon subsection (a)(1) of the rule, it is clear that the Secretary has been accorded, by statute, an unconditional right to intervene. ERISA § 502(h), 29 U.S.C. § 1132(h), provides that the Secretary of Labor "shall have the right in his discretion to intervene in any action" involving issues arising under ERISA. The Secretary's intervention in this case is therefore proper as a matter of right.

Under Rule 24(a)(2), it is also clear that the Secretary's claims in Donovan v. Fitzsimmons with respect to the Baron payments are closely related, if not identical, to the claims presented in this case. Either as a legal matter or as a practical matter, the Secretary's interest in these claims may be significantly impaired through a settlement of the present case -- especially upon the terms outlined above. The Secretary's overall interest in protecting the rights of participants and beneficiaries of the Pension Fund and conserving Pension Fund assets may likewise be adversely affected. For these reasons, intervention appears appropriate under Rule 24(a)(2).

The Secretary may intervene in this case, additionally, under the "permissive intervention" provisions of Rule 24(b). The pertinent portions of this Rule provide as follows:

> Upon timely application anyone may be permitted to intervene in an action: . . .(2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> When a party to an action relies for ground of claim or defense upon any statute. . .administered by a federal . . . governmental officer or agency . . ., the officer or agency upon timely appliciation may be permitted to intervene in the action.

Under the first part of Rule 24(b)(2), the Secretary's claims in Fitzsimmons obviously have questions of law and fact in common with the issues presented in this case. Indeed, as noted, the claims are virtually identical, except that the Secretary has sought restitution from former officials of the Pension Fund (including Mr. Baron), whereas plaintiff trustees in this action have sued the payors of the kickback along with Mr. Baron.

Intervention is also available under the "governmental intervention" provisions of Rule 24(b)(2). Plaintiff trustees grounded jurisdiction and their right to relief in this case upon various sections of ERISA. E.g., ERISA §§ 502 & 409, 29 U.S.C. §§ 1132 & 1109. [10] Since the Secretary of Labor is charged with administering and enforcing ERISA, he should be permitted to intervene in this litigation under Rule 24(b)(2), in order to present his views regarding the ERISA issues which are involved in this case.[11]

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[10] See Amended Complaint ¶1.

For all of these reasons, the Secretary's motion for leave to intervene is appropriate under both Rule 24(a) and Rule 24(b), and should be granted.

B. The Secretary's Motion for Leave to Intervene is Timely

One prerequisite of intervention under Rule 24(a) and (b) is that the application be "timely." "'Timeliness,'" as one court has indicated, "is not a word of exactitude or of precisely measurable dimensions."[12] The question of timeliness is to be determined "from all the circumstances."[13] And it is to be determined "by the court in the exercise of its sound discretion. . . ."[14]

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[11] Cf. Order granting intervention in Shenker v. Robbins, No. 80-185 (D. Nev., Order filed March 6, 1981). The court in Shenker stated:

> [T]he Secretary's intervention will ensure that all the defenses available to the defendants are aggressively asserted so as to protect the interests of the Pension Fund's beneficiaries. Any prejudice to the original parties caused by the intervention will be outweighed by the Secretary's input.

It should be pointed out that this is not the first case which the Pension Fund trustees have settled, or attempted to settle, under questionable circumstances. In M&R Investment Co. v. Fitzsimmons, 484 F. Supp. 1041 (D. Nev. 1980), appeal pending (9th Cir.), these same trustees, on the eve of trial, sought to settle an action which requested specific performance of a $40 million loan to the Dunes Hotel and Country Club, plus damages. The proposed settlement terms included a new loan to the borrower in the amount of over $90 million. The Secretary of Labor, an intervenor-defendant in the case, vigorously opposed the terms of the settlement, and the court rejected the settlement. Ultimately, the court granted the Secretary's and the Pension Fund's motions to dismiss under Rule 41(b), Fed. R. Civ. P., without even hearing evidence from defendants. Id. at 1043-44.

Here, as noted, the Secretary commenced an inquiry into the settlement agreement as soon as he was advised that the Pension Fund and defendant Baron had reached a settlement. Counsel for the Secretary immediately met with counsel for plaintiffs to ascertain the terms and rationale of the settlement. He secured pleadings to appreciate the legal arguments involved. He conducted independent investigation and research into the matter, so as not to be hasty or mistaken in attacking the settlement and seeking to reopen proceedings. See also note 7, supra. Under these circumstances, the filing of a motion for leave to intervene several months after the order dismissing defendant Baron is timely, as required by Rule 24.

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[12] McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970).

[13] NAACP v. New York, 413 U.S. 345, 366 (1973)(footnote omitted).

[14] Id. One commentator has pointed out that a less stringent standard of timeliness should govern intervention of right than permissive intervention:

> Since in situations in which intervention is of right the would-be intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely, even though they might deny the request if the intervention were merely permissive.

7A Wright & Miller, Federal Practice and Procedure § 1916, at 573 (1972).

In a number of cases, involving circumstances such as those presented here, courts have found intervention to be timely. In Cuthill v. Ortman-Miller Machine Co., 216 F.2d 336 (7th Cir. 1954), the court permitted intervention after judgment by a stockholder who alleged that defendant corporation had colluded with plaintiff, concealed valid defenses, and allowed a fraudulent judgment to be entered in favor of plaintiff. In Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941), a private party was allowed to intervene to enforce an antitrust consent decree between the government and a pipe line company, six years after entry of the decree. The Court recognized that, while this was not a "conventional form of intervention," the "enforcement of a public law...demands distinct safeguarding of private interests by giving them a formal status in the decree." Id. at 506. [15] In Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. 1978), the court of appeals reversed a lower court order denying intervention by a citizens group, which sought to protest a consent decree; the court found that intervention was timely and necessary, since, "Obviously, appellants' interest was not represented at all." Id. at 239. Finally, in New York State v. United States, 65 F.R.D. 10 (D.D.C. 1974), the court, after initially denying a motion filed by the NAACP to intervene in a voting rights case, reversed itself two years later when proceedings were reopened in the case; the court stated that intervention was proper under Rule 24 and timely, "in view of the Court's decision to reopen the case." Id. at 12. See also cases cited in note 9, supra.

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[15] The Supreme Court relied upon the holding in Missouri-Kansas Pipe Line Co. to allow intervention by several aggrieved parties, under similar circumstances, in Cascade Natural Gas Corp v. El Paso Natural Gas Co., 386 U.S. 129, 134-36 (1967). The Missouri-Kansas Pipe Line Co. and El Paso Natural Gas cases are discussed in some detail in 3B J. Moore's Federal Practice ¶ 24.07[2] and ¶ 24.09-1[1] (1980), respectively.

C. The Secretary's Intervention Will Not Result in Prejudice to the Parties

Harm or prejudice to the original parties is an additional consideration under Rule 24.[16] The Secretary submits that plaintiff Pension Fund will not be prejudiced, but will be significantly benefited by the presence of the Secretary as a litigant in this proceeding. Moreover, defendant Baron may have to relitigate the issues presented here in any event (i.e., in the Donovan v. Fitzsimmons case), unless there is a satisfactory resolution of the issues on the merits or an adequate settlement. While recognizing the public interest in the voluntarily resolution of lawsuits by settlement, as well as the salutary principle of judicial finality, the Secretary believes that the benefits of intervention and reopening this proceeding far outweigh any potential prejudice to the original parties. In this regard, the recent words of this Circuit concerning settlement, in the class action context, are instructive:

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[16] Rule 24(b) requires the court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." See EEOC v. United Airlines, Inc., 515 F.2d 946, 949 (7th Cir. 1975).

> Settlement of a class action is not. . . an unmixed blessing. Balanced against the "overriding public interest in favor of settlement" are strong countervailing public policies which counsel against automatic judicial acceptance of such agreements. First and foremost is the fact that most of those whose rights are affected by a class action settlement -- the members of the class [here, by analogy, the Pension Fund's 500,000 participicants and beneficaries] -- are not involved in its negotiation nor are they present to voice their views in court. The class members must rely upon the representation of the class representatives and class counsel to protect their interests. While this representation is no doubt vigorous in most cases, on occasion the negotiating parties may find that their individual interests can best be served by a settlement which is not in the best interests of the class as a whole. Similarly, class counsel may be persuaded by the prospect of a substantial fee to accept a settlement proposal which leaves the class with less relief than could have been procured through more vigorous negotiation. In such cases, the class members may find that substantial rights have been bargained away in exchange for relief which inures primarily to the

> benefit of a few class members or class counsel. 17/

Because the Secretary's intervention is proper under Rule 24(a) and (b), and because intervention is timely, beneficial, and not prejudicial to the rights of the original parties, the Court should grant the Secretary's motion for leave to intervene.

II. The Court Should Set Aside Its Order of Dismissal as to Defendant Baron

A. Rule 60(b) Should be Accorded a Liberal Construction

Rule 60, Fed. R. Civ. P., authorizes a court under certain circumstances to set aside final judgments and orders entered in a proceeding. Rule 60(a) deals with clerical mistakes. Rule 60(b), the provision invoked by the Secretary in the present motion, provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether

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17/ Armstrong v. Board of School Directors, 616 F.2d 305, 313 (7th Cir. 1980).

Of course, if the present case had been brought as a class action on behalf of the Pension Fund's participants and beneficiaries, the case could not have been settled or compromised, "without the approval of the court." Rule 23(e), Fed. R. Civ. P. Notice of the proposed compromise and dismissal would have been provided to all members of the class. Id. The notice and court approval requirements would have been applicable to "protect the rights of putative class members" -- even if the class had not been certified prior to settlement. Simer v. Rios, No. 80-2544, _____ F.2d ___ (7th Cir., October 7, 1981), slip op. at 19.

> heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b), as noted, contains five specific grounds for setting aside judgments or orders, and one residual or "catch-all" provision. Professor Moore has indicated that, in view of the remedial nature of the rule, "[C]ourts should and do give a liberal construction to 60(b)."18/ Commenting upon the operation of Rule 60(b), one court has noted:

> Rule 60(b) and its counterparts in state statutes, have proven themselves to be valuable, equitable and humane discretionary powers by which courts have been able to relieve the oppressed from the burden of judgments unfairly, fraudulently or mistakenly entered.19/

In accordance with the terms of Rule 60(b), and the liberal construction given to the rule, the Secretary of Labor has urged the Court to set aside the order dismissing defendant Baron, pursuant to Rule 60(b)(1),(3), and (6).

18/ 7 J. Moore's Federal Practice ¶60.18[8], at 216.1 (1979); *see* *Klapprott* v. *United States*, 335 U.S. 601, 609 (1949); *Schwab* v. *Bullock's, Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Beshear* v. *Weinzapfel*, 474 F.2d 127, 131 (7th Cir. 1973).

19/ *Edwards* v. *Velvac, Inc.*, 19 F.R.D. 504, 507 (E. D. Wis. 1956); *see also* *Fuhrman* v. *Livaditis*, 611 F.2d 203, 204 (7th Cir. 1979) (decision to grant relief under Rule 60(b) committed to trial court's discretion).

B. The Dismissal Order Should Be Set Aside as Based Upon Mistake or Excusable Neglect .

Rule 60(b)(1) allows the Court to relieve a party from an order based upon mistake or excusable neglect. Here, the Secretary contends, the settlement and dismissal order resulted from mistaken legal views and serious misjudgments on the part of plaintiffs and their counsel. The order dismissing defendant Baron should therefore be set aside.20/

20/ Professor Moore, in his discussion of Rule 60(b)(1), makes clear that the rule applies to mistaken views of the law and misjudgments regarding legal matters. He indicates:

> The rule [60(b)(1)] is broad enough to cover mistakes on the part of counsel induced by an erroneous view of the law, and in some cases relief has been afforded on this ground.

7 J. Moore's Federal Practice ¶60.22[2], at 251 (1979); see A.F. Dormeyer Co. v. M.J. Sales & Distributing Co., 461 F.2d 40, 42-43 (7th Cir. 1972); Fleming v. Huebsch Laundry Corp., 159 F.2d 581, 585 (7th Cir. 1947).

This Circuit has recently required that proceedings be reopened under Rule 60(b) in several instances, citing the principle that,

> While neither ignorance nor carelessness by a party or his attorney is a proper basis for Rule 60(b) relief,. . . courts are reluctant, under certain circumstances, to attribute to a client the mistakes of his attorney. Upon a proper showing, even a consent judgment may be set aside under Rule 60(b).

Smith v. Widman Trucking & Excavating, Inc. 627 F.2d 792, 796 (7th Cir. 1980) (citations omitted); see also Bradford Exchange v. Trein's Exchange, 600 F.2d 99, 102 (7th Cir. 1979)(portion of agreed injunction vacated upon showing of attorneys' lack of authority, and court's finding that

(footnote cont'd)

1. "Release of Joint Tortfeasors" Theory

Plaintiffs' action in settling and dismissing defendant Baron apparently resulted from their concern that Baron might ultimately be released from liability, as a joint tortfeasor, based upon the Pension Fund's settlement and release of the Byrants in earlier litigation. This view of the law disregards the provisions of ERISA as well as common law trust principles; misconstrues the doctrines of release and joint tortfeasor libility; and totally ignores the Court's contrary ruling on the matter.

First, the "joint tortfeasor theory" disregards the provisions of ERISA § 409(a), 29 U.S.C. § 1109(a). This statute provides (emphasis supplied):

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ERISA § 409(a) -- following established common law trust

(Footnote cont'd)

"obligations which [appellants] assumed were so onerous and costly that it is dubious whether [appellants] would have given their attorneys authority to stipulate to an injunction with such a provision").

doctrine [21] -- imposes personal, individual, several liability upon a fiduciary, such as Baron, who breaches his trust responsibilities under ERISA. [22] The remedy required is restitution of losses by the fiduciary to the aggrieved pension plan. These stringent legal requirements of ERISA should come as no surprise to plaintiff trustees. The doctrines are at the heart of ERISA and form the basis for plaintiff's theory of recovery. Plaintiffs sued under ERISA; alleged breaches of ERISA §§ 404(a) & 406(b), 29 U.S.C. §§ 1104(a) & 1106(b), by former fiduciary Baron; and sought restitution under ERISA § 409(a), 29 U.S.C. § 1109(a), of $303,427.41 from defendant Baron and from co-defendants Foy and Kathy Bryant.

Nor can plaintiffs ignore ERISA and its common law trust predicate and suggest that Illinois or California tortfeasor principles supersede ERISA § 409(a). On the contrary, ERISA § 514(a), the preemption section, explicitly asserts that

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[21] _See_ Restatement of Trusts 2d §§ 224, 258 (1959); Bogert, Trusts and Trustees §§ 701, 862, 901 (2d ed. 1975) (trustees and third-party participants jointly and severally liable for breaches of trust); III Scott on Trusts §§ 224.6, 258-258.3 (3d ed. 1967); _Blankenship_ v. _Boyle_, 337 F. Supp. 296, 303 (D.D.C. 1972) (judgment entered against offending trustees, jointly and severally).

[22] _See_ S. Rep. No. 127, 93d Cong., 1st Sess. 46-47 (1973), _reprinted_ _in_ [1974] U.S. Code Cong. & Ad. News. 4882 ("co-fiduciaries . . . jointly and severally liable"; analysis of ERISA predecessor bill in Senate report); _Fremont_ v. _McGraw-Edison Co._, 606 F.2d 752, 758-59 (7th Cir. 1979), _cert. denied_, 445 U.S. 951 (1980) (liability of trustee and of aider or abettor under ERISA § 409(a)).

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). 23/ Plaintiffs themselves made an analogous argument of exclusive ERISA jurisdiction in opposing defendants' motions for summary argument; they contended that their claims under ERISA survived, or were excepted from, California's state law on compulsory cross-complaints. See Plaintiffs' Consolidated Memorandum in Opposition, filed November 6, 1980. Given the clear language in ERISA § 409(a) regarding personal, individual liability, and given ERISA § 514(a)'s preemption doctrine, plaintiffs' settlement with defendant Baron on some vague "release of joint tortfeasors" theory makes absolutely no sense.

Second, assuming arguendo ERISA's inapplicability, and the applicability of principles of tort (rather than trust) liability, plaintiff trustees were on firm ground in asserting individual, several liability on the part of defendant Baron. See Second Amended Complaint, Prayer for Relief, ¶¶ 1-2, filed April 3, 1979. Baron was not a party to the Pension Fund's settlement with the Bryants, and could not have

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23/ See Alessi v. Raybestos-Manhattan, Inc., 101 S. Ct. 1895, 1906-07 (1981) (discussion of ERISA § 514's preemption provisions); Bucyrus-Erie Co. v. Wisconsin Dept. of Industry, Labor & Human Relations, 599 F.2d 205, 209-13 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980) (ERISA § 514 preempts not only state laws specifically related to employee benefit plans or inconsistent with ERISA, but also state laws of general applicability).

asserted res judicata or collateral estoppel principles with respect to the Pension Fund's claim against him. As for the release argument pressed by the Bryants, this was not a matter that defendant Baron could have invoked, in "coattail" fashion. The disloyal acts of fiduciary Baron in receiving kickbacks and undeserved compensation were separate and divisible from the acts of the Bryants; the injury to the Pension Fund caused by Baron was separate; and the relief owed by Baron was separate and distinct, as illustrated by the fact that the Pension Fund in its amended complaint sought the $200,000 kickback amount specifically from Baron. Id. ¶2. The Pension Fund's claim against Baron was thus wholly unaffected by the settlement of earlier litigation between the Pension Fund and the Bryants. 24/ An Illinois court has construed the state's common law doctrine on this precise point:

> [A] release to, or the receipt of money from, a tort-feasor who is not in fact liable with another will not discharge such other, where the

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24/ Nor may Baron claim a "set-off," based upon the Bryant settlement. The $300,000 sum sought by the Pension Fund in the present action -- representing the kickback amounts and severance pay -- was never the basis of any Pension Fund claim in the earlier litigation between the Pension Fund and the Bryants. As noted by the Court, while the Pension Fund trustees raised various affirmative defenses against the Bryants' usury counterclaim, see note 2, supra, they did not "proceed in that action to seek recovery from the Bryants of the . . . payment[s] made to Baron." Memorandum Order of August 20, 1980, at 4; see also Memorandum Order of February 18, 1981, at 2-4.

(footnote cont'd)

> respective tort-feasors have committed separate and distinct offenses or inflicted separate and distinct injuries upon the plaintiff. [25]

Any release of the Bryants, therefore, did not operate to release Baron from his separate fiduciary misconduct against the Pension Fund.

Even assuming that defendants' kickback conduct was "joint and indivisible," it is clear that the Pension Fund's settlement and release agreement with the Bryants was not intended to release Mr. Baron. Baron, although named as a counter-defendant in the Bryant suit, was never served and was not a signatory of the settlement. Nor was his liability resolved or encompassed in the settlement documents. See notes 2, 24, supra; Exh. A (Murphy Aff.), attached to Bryant Defendants' Reply Memorandum, filed December 10, 1980. Under

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(Footnote cont'd)

Since the Pension Fund's claim for the Baron payments remained inchoate and was not part of the "settlement mix" in the earlier litigation, defendant Baron may not demand a set-off against the Pension Fund based upon settlement of the earlier litigation. Additional evidence that the kickback matter was not part of the "settlement mix" in the Pension Fund-Bryant litigation is furnished by the fact that the present action, seeking recoupment of the kickbacks and Baron compensation, was filed on the day after the Bryant settlement agreement was signed. See note 2, supra.

[25] Tidwell v. Smith, 169 N.E.2d 157, 162 (Ill. App. 1960); see also Anderson v. Martzke, 266 N.E.2d 137, 141 (Ill. App. 1970).

As the state where the injury took place, and the state with the "most significant relationship" and interest in the subject matter of the case, Illinois law should govern the common law claims of the Pension Fund against defendant Baron. See 16 Am. Jur. 2d Conflict of Laws §§ 100, 103 (1979).

these circumstances, the release granted to the Bryants does not operate to release defendant Baron -- and certainly not with respect to the unrelated compensation and severance pay amounts. As emphasized by the Supreme Court in an exhaustive discussion of this issue in the antitrust context, "The straightforward rule is that a party releases only those other parties whom he intends to release."26/

Third, this Court has already repudiated the "release-of-one, release-of-all-tortfeasors" theory, which supposedly led

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26/ Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 347 (1971) (emphasis supplied). In Zenith Radio Corp., the Supreme Court approved a new rule focusing upon the intent of the parties, and expressly rejected: (a) the common law rule that, "[A] release of one joint tortfeasor released all other parties jointly liable, regardless of the intent of the parties;" and (b) the more recent rule that, while ordinarily a release of one co-conspirator releases all others, the release "will not have such an effect if a plaintiff expressly reserves his rights against the others." Id. at 343, 344.

Courts in Illinois have followed the Supreme Court's lead in Zenith Radio Corp. E.g., Robinson v. United States, 408 F. Supp. 132, 137 (N.D. Ill. 1976)("Illinois courts have uniformly held that the effect of a release must be based on the intention of the parties gathered from consideration of the release as a whole."); Adams Labs., Inc. v. Jacobs Eng. Co., 486 F. Supp. 383, 390-91 (N.D. Ill. 1980); Pate v. City of Sesser, 393 N.E.2d 1146, 1149-52 (Ill. App. 1979); Mitchell v. Weiger, 371 N.E.2d 888, 890-91 (Ill. App. 1977); Gladinus v. Laughlin, 366 N.E.2d 430, 432 (Ill. App. 1977). The State recently codified this principle of "intent," enacting legislation that provides that an agreement releasing one tortfeasor does not discharge any other tortfeasors, "unless its terms so provide." Ill. Ann. Stat. ch. 70, § 302(c) (Smith-Hurd 1981-82 Supp.). California has a statute to the same effect. Cal. Civ. Proc. Code § 877(a) (West 1980); see also id. § 877.6 (hearing authorized regarding good faith of proposed settlement and dismissal of joint tortfeasor).

plaintiff trustees to settle this case. In its August 20, 1980 Memorandum Order, the Court found Baron liable to the Pension Fund in the amount of $303,427.41 -- while at the same time adverting to, but not deciding, the defense of release available to the Bryants. Implicitly, the Court rejected the proposition that any prior release of the Bryants would operate to release defendant Baron. Likewise, if plaintiffs themselves were truly concerned about the consequences of a strict application of the "release" doctrine, they never would have released defendant Baron in January 1981 since, under their purported view (and in spite of any reservation of rights), this might have worked to release the Bryants.

The legal arguments advanced above clearly show that the Pension Fund and plaintiff trustees had a viable claim against defendant Baron -- so viable, in fact, that this Court granted summary judgment in their favor. To discard or compromise this claim, in the face of the Court's ruling, the clear language of ERISA § 409(a), and the precedents cited above, is at best a mistake or negligence and, at worst, malfeasance. For these reasons, the Secretary of Labor urges that the order dismissing defendant Baron be set aside under Rule 60(b)(1).

2. Lack of Investigation Into Defendant Baron's Assets

Totally apart from the legal errors embodied in the Pension Fund's decision to settle this case, there apparently was little or no investigation by plaintiffs into defendant Baron's assets prior to settlement. See Rinaldi Affidavit, ¶ 8. Compromising a judgment for less than 25% of its value, with payments over a number of years and without interest, may be understandable if the debtor has minimal resources or ability to pay. However, such a settlement is premature, if not entirely inappropriate, where the settling party lacks all knowledge of the debtor's financial condition.

Here, plaintiffs conducted no formal discovery regarding Baron's financial resources. Nor, apparently, did they demand financial statements from Baron, or inquire seriously into his ability to pay a large judgment. Instead, Baron offered $45,000; the Pension Fund asked for an additional 50%; Baron agreed; and the deal was struck. See Appendix B, attached. To have settled the case under these circumstances was certainly a mistake or misjudgment on plaintiffs' part, resulting in substantial losses to the Pension Fund. Under Rule 60(b)(1), the settlement and dismissal order should therefore be set aside.

C. The Settlement and Dismissal Order Should Be Set Aside Under Rule 60(b)(3) and (6)

Apart from Rule 60(b)(1)'s provisions dealing with mistake, Rule 60(b)(3) separately provides that the court may set aside a judgment or order based upon fraud, misrepresentation, or misconduct of an adverse party. The Secretary presently has no information that the Baron settlement and dismissal stemmed from fraud, misrepresentation, or actual misconduct on the part of defendant Baron or plaintiff trustees. However, to the extent plaintiffs ignored or jettisoned sound legal theories for recovery; to the extent any investigation into defendant Baron's assets was overlooked or foregone; and to the extent that defendant's financial position may have been misstated, the Secretary posits Rule 60(b)(3) as a basis for reopening this proceding.

Rule 60(b)(6) authorizes a court to set aside a judgment or order for "any other reason [than those enumerated in subsections (b)(1)-(5)] justifying relief from the operation of the judgment" or order. Rule 60(b)(6) is a residual clause,

> a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief but the motion is, nevertheless, timely and the reason justifies relief. 27/

If a Rule 60(b)(6) motion is timely, it is not crucial to determine whether the reason for relief is contained in any of the other subsections of Rule 60(b); attention should be focused upon "a determination as to whether the reason justifies relief." 28/

27/ 7 J. Moore's Federal Practice ¶ 60.27[2], at 375-76 (1979); see Annotation, 15 ALR Fed. 193 (1973).

28/ 7 J. Moore's Federal Practice ¶ 60.27[2], at 353 (1979).

Here, the Secretary has set forth in detail the justification for relief from the order dismissing defendant Baron. The Secretary has specifically cited subsections (b)(1) and (b)(3) of Rule 60 as bases for setting aside the earlier order. In the event the Court views relief under these subsections to be unavailable or unwarranted, the Secretary urges the Court to apply Rule 60(b)(6) to set aside the order of dismissal.

D. The Secretary's Motion Is Timely Under Rule 60 (b)

A final consideration relating to the Secretary's motion for relief under Rule 60(b) is the requirement that the motion be timely. The Secretary has already addressed the "timeliness" issue and cited authorities supporting his position, in the section above dealing with his motion to intervene. See discussion supra, at pages 18-21 & notes 9, 15. The authorities are equally applicable in the Rule 60(b) context, sin[illegible]tually all of the intervenors in these cases sought to [illegible]ourt's earlier order or judgment. Because of its [illegible]igh[illegible]ferent focus, however, the Rule 60(b) timeliness i[illegible]ddressed separately here, in brief fashion.

[illegible]le 60(b) provides, in pertinent part:

> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

One court has recognized that, "What constitutes reasonable time must of necessity depend upon the facts in each individual case." 29/ The factors to be weighed include the potential prejudice to the parties, and whether the movant demonstrates that he acted promply following entry of the order or judgment that is challenged. 30/

The order dismissing defendant Baron in this case was entered on February 18, 1981, and judgment as to all parties was entered on June 1, 1981. The present motion thus complies with the one-year "maximum" set forth for Rule 60(b)(1) and (3). Further, as discussed above, the motion has been brought within a reasonable time of the Secretary's learning of the settlement -- and almost immediately after the Secretary obtained trustee minutes and discovered from the pleadings that the Pension Fund trustees already had a potential judgment in hand when they inexplicably proceeded to settle the case with defendant Baron, for a fraction of the amount awarded to the Pension Fund by the Court. See Rinaldi Affidavit ¶¶6-13. The Rule 60(b) motion will plainly enhance rather than prejudice the interests of the Pension Fund; as for defendant Baron, he might otherwise have to litigate this entire matter anew in Donovan v. Fitzsimmons, so prejudice to him is minimal. The Secretary therefore submits that his motion is timely and proper under Rule 60(b).

29/ In re Cremidas' Estate, 14 F.R.D. 15, 18 (D. Alas. 1953).

30/ 11 Wright & Miller, Federal Practice and Procedure §2866, at 228-29 (1973).

CONCLUSION

For all of the reasons set forth above, the Secretary of Labor urges the Court to grant him leave to intervene as a plaintiff and to set aside the Order of February 18, 1981 dismissing defendant Baron. The Secretary's intervention is proper and timely under Rule 24(a) and (b), and Rule 60(b), Fed. R. Civ. P. On the merits, the mistaken, negligent, or other conduct of plaintiff trustees in settling this action with defendant Baron should be set aside since there was neither (a) an adequate legal basis for settlement; nor (b) a sufficient investigation into Baron's assets prior to settlement. Accordingly, the Court should set aside the dismissal order and reopen proceedings.

Respectfully submitted,

DAVID H. FELDMAN
Associate Solicitor
for Special Litigation

Richard P. Carr

EDWARD J. MORAN
Assistant U.S. Attorney

RICHARD P. CARR
Attorney
U.S. Department of Labor
Office of the Solicitor
Special Litigation
P.O. Box 37296
Washington, D.C. 20013
(202) 523-7751

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the attached Motion of the Secretary for Leave to Intervene, Motion to Set Aside Order of Dismissal, and Memorandum in Support of Motions upon counsel of record for the parties in this action at the addresses shown below, by hand-delivery, this 25th day of November 1981.

Rhonda A. Davis
Rhonda Davis
U.S. Department of Labor
Labor-Management Services
Administration
175 W. Jackson
Room A-1201
Chicago, Illlinois 60604

James L. Coghlan, Esq.
William J. Nellis, Esq.
Coghlan, Joyce & Nellis
One North LaSalle, Suite 4000
Chicago, Illinois 60602

Raymond J. Smith, Esq.
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Suite 1800
Chicago, Illinois 60604

Donald C. Shine, Esq
Nisen, Elliott and Meier
One North LaSalle, Suite 2300
Chicago, Illinois 60602

1981

LIST OF APPENDICES

APPENDIX A:	Memorandum Order of August 20, 1980, granting summary judgment against defendant Baron in amount of $303,427.41, plus costs.
APPENDIX B:	Minutes of Pension Fund's Board of Trustees Meetings: January 20-21, 1981; December 16-17, 1980.
APPENDIX C:	Memorandum Order of February 18, 1981, dismissing defendant Baron (by stipulation) and granting summary judgment in favor of the Bryant defendants.
APPENDIX D:	Affidavit of Bruce Rinaldi.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Prentice H. Marshall

Cause No. 78 C 3702

Date August 20, 1980

Title of Cause CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al. v. ALVIN BARON, et al.

Brief Statement of Motion ORDER

Sent for Microfilming AUG 20 1980

Filmed on

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

DOCKETED
AUG 20 1980

Plaintiffs' motion for summary judgment is granted as to defendant Alvin Baron in the amount of $303,427.41 and costs and is denied as to the defendants Foy Bryant and Kathy Bryant. Cause set for report on status re punitive damages and Bryants' 1404(a) motion on October 3, 1980 at 11:00 a.m. DRAFT.

Marshall, J.

APPENDIX A

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND)
SOUTHWEST AREAS PENSION FUND;)
et al.,)
)
Plaintiffs,)
)
v.) No. 78 C 3702
)
ALVIN BARON, FOY BRYANT and)
KATHY BRYANT,)
)
Defendants.)

MEMORANDUM ORDER

This is an action by plaintiffs The Central States, Southeast and Southwest Areas Pension Fund (the Fund) and its trustees against defendants Alvin Baron, a former employee of the Fund, and Foy and Kathy Bryant, the principals of Mount Vernon Memorial Park, a California corporation which was a debtor of the Fund, arising out of $200,000 allegedly paid by the Bryants to Baron as a bribe or kickback in order that Mount Vernon could obtain a third loan from the Fund. The action is brought under the Employee Retirement Income Security Act of 1974 and the common law for Baron's breach of fiduciary duty to the Fund knowingly induced and participated in by the Bryants. Plaintiffs seek to recover from Baron and the Bryants an amount equal to the $200,000 which the Bryants paid Baron, Baron's compensation from the Fund in the amount of $103,427.41 paid during the period of his breach of trust, and punitive damages. Plaintiffs have moved for summary judgment. Clearly we cannot grant their motion for summary judgment with respect to punitive damages. However, we can and do grant plaintiffs' motion with respect to the defendant Alvin Baron and deny it with respect to the defendants Bryant for the reasons hereinafter stated.

Baron has been prosecuted and convicted in this district of unlawfully receiving the $200,000 kickback which is the subject of this action. That conviction has been affirmed, the judgment is final, and it precludes Baron from relitigating the same issues here. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Baron's assertion that he is entitled to relitigate the question of who got the money or whether Bryant's claim that he paid Baron the money was an income tax dodge collide directly with the very purposes of the doctrine of collateral estoppel. The consequences of Baron's breach of trust are indisputable: he forfeits his right of compensation during the period of his treachery and he accounts to his principal, the Fund, for his ill-gotten gain. Accordingly, plaintiffs' motion for summary judgment against Alvin Baron is granted; partial summary judgment will enter in favor of plaintiffs and against the defendant in the amount of $303,427.41 and costs. Plaintiffs are directed to advise the court within 15 days as to whether they wish to press the question of punitive damages. If they do not, a finding pursuant to Rule 54(b), F.R.Civ.P., will be made and the Clerk will be directed to enter a final judgment in favor of the plaintiffs and against the defendant Baron in the aforesaid amount.

The matter is substantially different insofar as the defendants Bryant are concerned. It is conceded that they made payments to Baron which are the subject of the action. And we are not impressed with their argument that they did not know that Baron (and perhaps others) were engaged in a breach of trust. Of course it matters not whether Baron kept all of the money for himself or distributed it elsewhere. The Bryants were participants. See Continental Management, Inc. v. United States, 527 F.2d 613 (Ct. Cl. 1975).

Nor are we impressed with their defenses of economic duress, etc. The evidence permits of only one conclusion and that is that Foy Bryant, accustomed to paying off to obtain loans from the Fund, initiated the pay-off with Baron.

What precludes summary judgment; however, are the Bryants' affirmative defenses of res judicata and release. In 1976 the trustees of the Fund brought a state court action against Mount Vernon Memorial Park and the Bryants to collect on Mount Vernon's obligations to the Fund. The Bryants were joined because they were guarantors of Mount Vernon's obligations. In that action Mount Vernon and the Bryants filed a counterclaim (denominated cross-complaint under California procedure) against the trustees alleging the payment to Baron and asserting that as a consequence of it the trustees and their fund had violated the California usery act. That is to say the Bryants characterized the payment to Baron as a form of commission for the loan. The trustees answered that state court counterclaim by alleging facts akin to those presented here. They did not, however, proceed in that action to seek recovery from the Bryants of the $200,000 payment made to Baron.

The state court action was settled. The settlement was presented to the state court and approved by it. The "agreement for settlement of litigation" provided in recital I, "The parties desire to settle and resolve the dispute between them as evidenced by the complaint and cross-complaint and the answers thereto, ..." Other provisions of the "agreement for settlement of litigation" conditionally release Mount Vernon (and its guarantors) from the obligations to the Fund and release the Fund from any claims related "to the circumstances, events and conditions alleged in the cross-complaint."

The Bryants maintain in opposition to the motion for summary judgment that plaintiffs are barred from asserting the instant claim under the California version of a compulsory counterclaim rule, California Code of Civil Procedure, § 426.10(a) and (c) and 426.30(a). They also maintain that the "agreement for settlement of litigation" properly construed effects a release of plaintiffs' claim.

Our inclination would be to rule in favor of the Bryants on these issues but they have not sought summary judgment. Furthermore, we perceive that the law of California would have a substantial bearing upon these issues and it has not been adequately briefed by the parties. But with these issues outstanding we cannot and will not grant summary judgment for the plaintiffs against the Bryants. Accordingly, plaintiffs' motion for summary judgment against defendants Foy Bryant and Kathy Bryant is denied.

There is presently pending the motion of the Bryant defendants to transfer this action to the United States District Court for the Eastern District of California, Sacramento, California, pursuant to 28 U.S.C. § 1404(a). We have previously indicated our inclination to grant that motion after affording plaintiffs the opportunity to present their motion for summary judgment. In light of the fact that the res judicata and release issues, which we regard as determinative, implicate California law we remain inclined to transfer the action there. However, before doing so, we will afford the defendants the opportunity to advise us whether they press their motion to transfer.

They are to do so in the same period that plaintiffs are to advise us of their desires with respect to punitive damages against Alvin Baron.

ENTER:

Prentice H. Marshall
United States District Judge

DATED: August 20, 1980.

ITEM NO. 22

SETTLEMENT WITH ALVIN BARON

On December 17, 1980 the Trustees of the Pension Fund adopted a Resolution (attached EXHIBIT A) containing a settlement counterproposal to Alvin Baron relative to the issues in a civil action (No. 78 C 3702) in the United States District Court for the Northern District of Illinois, Eastern Division. On December 18, 1980 a copy of that Resolution was delivered to Raymond J. Smith, attorney for Alvin Baron. In discussions since December 18, 1980 it has been concluded that the burden of remittance of $67,500, by Alvin Baron to the Pension Fund, within the contemplated 5-year period would be severe and might very well cause a default, but that an agreed settlement in the amount of $67,500 beneficial to the Pension Fund could be achieved if the term for payment of the additional $22,500 could be extended to a 5-year term commencing after the initial 5-year term for payment of $45,000. If the Resolution of the Trustees were thus modified (and incorporated in a mutually executed agreement protective of the interests of the Pension Fund, as contemplated by paragraph 2 of the Resolution), the settlement proceeds would be payable to the Pension Fund in accordance with the following schedule:

YEAR	AMOUNT
1981	$10,000.00
1982	10,000.00
1983	10,000.00
1984	10,000.00
1985	5,000.00
1986	4,500.00
1987	4,500.00
1988	4,500.00
1989	4,500.00
1990	4,500.00
TOTAL	$67,500.00

APPENDIX B

ITEM NO. 22

SETTLEMENT WITH ALVIN BARON

A recommendation from the Attorneys' Committee to the Trustees is requested.

* * *

ACTION OF THE ATTORNEYS' COMMITTEE MEETING - JANUARY 13, 1981

After a full discussion a motion was made, seconded and unanimously carried to recommend that the Trustees authorize and approve a modification of the Resolution adopted by the Trustees on December 17, 1980 (attached EXHIBIT A) to the extent that the $67,500 settlement proceeds would be payable to the Pension Fund in accordance with the above-described schedule, from 1981 until 1990.

* * *

ACTION OF THE FULL BOARD OF TRUSTEES MEETING - JANUARY 20-21, 1981

After a full discussion, a motion was made, seconded and unanimously carried to authorize and approve a modification of the Resolution adopted by the Trustees on December 17, 1980 (attached EXHIBIT A) to the extent that the $67,500 settlement proceeds would be payable to the Pension Fund in accordance with the above-described schedule, from 1981 until 1990. (At the meeting of the Trustees on January 21, 1981, the Trustees executed an Agreement [attached "EXHIBIT B"] which was later executed by Alvin Baron, to evidence the settlement.)

MINUTES OF THE FULL BOARD OF TRUSTEES MEETING
DECEMBER 16-17, 1980

ITEM NO. 80

SETTLEMENT PROPOSAL BY ALVIN BARON

At the meeting of the Trustees on December 17, 1981 William J. Nellis reported that on December 10, 1980 counsel for Alvin Baron communicated to counsel for the Pension Fund and its Trustees a proposal for settlement of all claims against Alvin Baron in a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"). At the same time, Mr. Nellis distributed to the Trustees for review and consideration a draft Resolution (attached "EXHIBIT A") and provided a privileged report to the Trustees concerning the history and status of the Baron-Bryant action, anticipated rulings by United States District Judge Prentice H. Marshall on pending summary judgment motions by Alvin Baron, Foy Bryant and Kathy Bryant and the relative advantages and disadvantages of the draft Resolution, adoption of which was recommended by Mr. Nellis to the Trustees.

* *

ACTION OF THE FULL BOARD OF TRUSTEES MEETING - DECEMBER 16-17, 1980

After a full discussion, a motion was made, seconded and unanimously carried to adopt the proposed Resolution (attached "EXHIBIT A"), effective immediately.

AGREEMENT

WHEREAS, since September 15, 1978 there has been, and there is now, pending a civil action entitled Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northen District of Illinois, Eastern Division (hereinafter "the Baron-Bryant action"); and

WHEREAS, the Trustees of Central States, Southeast and Southwest Areas Pension Fund (hereinafter "the Pension Fund") and Alvin Baron (hereinafter "Baron") enter into this agreement in order to resolve all issues between plaintiffs and Baron in the Baron-Bryant action, and without any intention to resolve any issues between plaintiffs and either Foy Bryant or Kathy Bryant in the Baron-Bryant action;

IT IS HEREBY AGREED AS FOLLOWS:

1. Baron promises to pay $67,500 to the Trustees in restitution of compensation received by him on or about March 7, 1975, in accordance with the following schedule:

(a) $10,000 on or before December 31, 1981; and
(b) 10,000 on or before December 31, 1982; and
(c) 10,000 on or before December 31, 1983; and
(d) 10,000 on or before December 31, 1984; and
(e) 5,000 on or before December 31, 1985; and

EXHIBIT B

(f) 4,500 on or before December 31, 1986; and

(g) 4,500 on or before December 31, 1987; and

(h) 4,500 on or before December 31, 1988; and

(i) 4,500 on or before December 31, 1989; and

(j) 4,500 on or before December 31, 1990.

2. The Trustees promise to execute, and counsel for plaintiffs in the Baron-Bryant action is authorized to execute and file in court forthwith, a stipulation with Baron for dismissal of Baron (only) as a defendant in the Baron-Bryant action, with prejudice, subject to the following condition subsequent: If Baron shall at any time default in any performance of his promise set forth above in paragraph 1 of this Agreement, the entire unpaid balance of the restitution schedule shall immediately become due and payable without any notice to or demand upon Baron, and in addition Baron shall be obligated to pay to the Trustees interest on said unpaid balance at a rate of 9% per annum, commencing on the date of such default, and all expenses incurred by the Trustees in collection of said unpaid balance, including reasonable attorneys' fees.

3. The Trustees expressly reserve all rights of action, claims and demands against any and all persons other than Baron. The promise by the Trustees set forth in this Agreement is a covenant not to prosecute against Baron (alone) the claims that have been asserted against him in the Baron-Bryant action, and is not a release in any manner or form.

EXHIBIT B

4. The obligations of Baron created by this Agreement cannot be assigned or modified without prior formal approval of the Trustees. The obligations of Baron created by this Agreement shall be binding upon Baron, his heirs, his Estate and all beneficiaries thereof, and his legal representatives.

5. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois.

6. Any action for enforcement and/or construction and/or rescission of this Agreement, including any action for damages arising from any breach of this Agreement, shall be filed and maintained exclusively in the United States District Court for the Northen District of Illinois, Eastern Division.

Executed and entered this 21st day of January, 1981, in Chicago, Illinois.

ALVIN BARON

LORAN W. ROBBINS
Trustee

ROBERT J. BAKER
Trustee

MARION M. WINSTEAD
Trustee

HOWARD MC DOUGALL
Trustee

HAROLD J. YATES
Trustee

R. V. PULLIAM, SR.
Trustee

EARL L. JENNINGS, JR.
Trustee

THOMAS F. O'MALLEY
Trustee

EXHIBIT B

7

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Prentice H. Marshall

Cause No. 78 C 3702

Date February 18, 1981

Title of Cause CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al. v. ALVIN BARON, et al.

Brief Statement of Motion RULING

Sent for Microfilming

FEB 20 1981

Mailed on FEB 25 1981

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DOCKETED
FEB 20 1981

Reserve space below for notations by minute clerk

The motion of defendants Foy Bryant and Kathy Bryant for summary judgment is granted. Judgment will enter in favor of defendants Foy Bryant and Kathy Bryant and against plaintiffs dismissing plaintiffs' action. Defendants shall have judgment for their costs.

By agreement of the parties, plaintiffs' claim against defendant Alvin Baron is dismissed with prejudice and without costs. (DRAFT).

Marshall, J.

FEB 20 1981

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND;
et al.,

Plaintiffs,

v.

ALVIN BARON, FOY BRYANT and
KATHY BRYANT,

Defendants.

No. 78 C 3702

MEMORANDUM ORDER

Since our Memorandum Order of August 20, 1980 plaintiffs and defendant Alvin Baron have settled their aspect of this controversy and defendants Foy and Kathy Bryant have moved for summary judgment upon the grounds that plaintiffs' action is barred by res judicata in light of California's compulsory counterclaim rule and the dismissal with prejudice of an earlier action between the same parties in the California state court. In addition, defendants assert that plaintiffs' instant claim has been released.

This is an action by plaintiffs The Central States, Southeast and Southwest Areas Pension Fund (the Fund) and its trustees against Alvin Baron, a former employee of the Fund, and Foy and Kathy Bryant, the principals of Mount Vernon Memorial Park, a California corporation which was a debtor of the Fund, arising out of $200,000 allegedly paid by the Bryants to Baron as a bribe or kickback in order that Mount Vernon could obtain a loan from the Fund. Plaintiffs' claim is said to be brought under the Employee Retirement Income Security Act of 1974 and the common law for Baron's breach of fiduciary duty to the Fund which, it is averred, was knowingly induced and participated in by the Bryants. Plaintiffs seek to recover from Baron and the Bryants an amount equal to $200,000 which the Bryants paid Baron plus Baron's compensation from the Fund in the amount of $103,427.41 during the period of his breach of trust, and punitive damages. As previously noted, the claim against Baron has been settled.

The Bryants have pleaded affirmative defenses of res judicata and release. Those defenses are the subject of the Bryants' motion for summary judgment and arise out of the following undisputed facts.

In 1976 the trustees of the Fund brought a state court action against Mount Vernon Memorial Park and the Bryants as guarantors to collect on Mount Vernon's obligations to the Fund. In that action Mount Vernon and Foy Bryant filed a counterclaim (denominated cross-complaint under California procedure) against the trustees alleging the

$200,000 payment to Baron for a loan obtained in 1974 and asserting that, as a consequence of it, the trustees and their Fund had violated the California usery act. That is to say the Bryants characterized the payment to Baron as a form of commission for the loan. The trustees answered that state court counterclaim by alleging facts akin to those which they allege here. Thus, as a second affirmative defense in the California action, they alleged that Mount Vernon and Bryant were "estopped from claiming the relief requested by the cross-complaint because cross-complainants initiated, suggested and requested the loan terms and commission payments of the transactions referred to in the cross-complaint and fraudulently induced any payment that may have violated the usery law."

As a fourth affirmative defense the California cross-defendants, here plaintiffs, alleged "that Alvin Baron was not an agent or employee of cross-defendants in doing any of the acts attributed to him in the allegations of the cross-complaint, and cross-defendants neither received any benefit from, nor ratified or approved the alleged payments to Alvin Baron."

And as a fifth affirmative defense the California cross-defendants, here plaintiffs, alleged "that cross-complainants [Mount Vernon and Foy Bryant] should be denied all relief requested by the cross-complaint on the ground that they come to this court with unclean hands in that if the cross-complainants made the alleged payments to Alvin Baron the payments were intentionally made by cross-complainants with knowledge that they were unlawful and their receipt was not authorized by cross-defendants."

California has a compulsory cross-complaint or counterclaim rule. Section 426.30(a) of the California Code of Civil Procedure provides:

> "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which [at the time of serving his answer to the complaint] he has against the plaintiff, such party may not thereafter in any action assert against the plaintiff the related cause of action not pleaded."

Section 426.10(a) of the Code of Civil Procedure defines a complaint to mean "a complaint or cross-complaint." Section 426.10(c) defines related cause of action to mean "a cause of action which arises out of the same transaction, occurrence or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint."

In these circumstances we think it clear that the California cross-defendants, who were plaintiffs there and are again plaintiffs here, were obliged in response to the Mount Vernon-Bryant cross-complaint to assert their common law claim that Mount Vernon and Bryant had participated in a breach of trust committed by Baron and were, accordingly, accountable to the California cross-defendants. The common law claim here asserted and which, in our judgment, should have been asserted in the California action, clearly arises out of the same transaction, occurrence or series of transactions. In our vernacular it arises out of the same nucleus of facts. In California Mount Vernon and Bryant acknowledged payments to Baron and asserted that certain consequences flowed therefrom. The cross-defendants were obliged in the California action to assert any common law consequences flowing from that same set of facts. This they failed to do.

Here plaintiffs urge that they were not obliged to plead their claim in the California state court action because it arises under ERISA and 29 U.S.C. § 1132(e)(1) confers exclusive jurisdiction of civil actions under ERISA upon United States District Courts. Plaintiffs go on to point out that under § 426.30(a) and 426.40(b) the California compulsory cross-complaint does not obtain where "the court in which the [principal] action is pending . . . [is] prohibited by . . . a statute from entertaining the cause of action not pleaded." Plaintiffs go on to point out that the legislative committee comment accompanying that particular code provision recognizes that, "In some cases, the federal courts have exclusive jurisdiction of the federal cause of action. . . . In these cases, subdivision (b) of section 426.40, recognizing that the federal cause of action is not permitted to be brought in the state court, provides an exception to the compulsory joinder or compulsory cross-complaint requirements. . . . Subdivision (d) makes clear that his inability to assert his federal cause of action in the state court does not preclude him from bringing a later action in the federal court to obtain relief under the federal statute."

Of course California could not compel plaintiffs to bring a claim in the California state courts over which federal courts have exclusive jurisdiction. But California can and has required that plaintiff plead its common law claim arising out of the same nucleus of facts. This plaintiff failed to do. And upon termination of the California action it was barred by California law from asserting the common law claim in another forum.

As a result of a settlement agreement, the terms of which we will address momentarily, the California action was dismissed with prejudice. The consequence of that, in our judgment, is that plaintiff is barred by principles of res judicata from relitigating those facts which were pleaded in the California action. Mount Vernon and Foy Bryant described the very facts which give rise to plaintiffs' complaint here. They asserted that those facts entitled them to benefits under California law. In response to those allegations plaintiffs, there cross-defendants, alleged facts identical (albeit alleged with greater brevity) to the facts alleged here regarding the Bryants' alleged misconduct in concert with Baron. When the action was dismissed with prejudice as to plaintiffs it was the equivalent of an adjudication of those facts and they may not in our opinion be readjudicated here. In short, while plaintiffs' legal theory under ERISA may not have been presented to the California court, its factual theory was and that factual theory has been adjudicated by a dismissal with prejudice adverse to plaintiff. It is not entitled to a second chance here.

Finally, there is the question of the release. The agreement for settlement of litigation executed by all of the parties to this action, except Baron, provides, "The parties desire to settle and resolve the disputes between them as evidenced by the complaint and cross-complaint and the answers thereto and to permit completion of the sale described in paragraph H above." Various provisions were thereafter recited. We are advised that the settlement agreement has been performed. As a consequence the parties resolved "the disputes between them" as described in the complaint, cross-complaint and answers. The cross-complaint filed by Mount Vernon and Foy Bryant and the answer thereto filed by the California cross-defendants described factually the same disputes between the parties there as exist between plaintiffs and defendants here. Those disputes have been resolved by settlement. They cannot be reasserted here.

The motion of defendants Foy Bryant and Kathy Bryant for summary judgment is granted. Judgment will enter in favor of the defendants Foy Bryant and Kathy Bryant and against the plaintiffs dismissing plaintiffs' action. Defendants shall have judgment for their costs.

By agreement of the parties plaintiffs' claim against defendant Alvin Baron is dismissed with prejudice and without costs.

ENTER:

Prentice H. Marshall
United States District Judge

DATED: February 17 1981.

JUDGMENT ON DECISION BY THE COURT CIV 32 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION FILE NO. 78 C 3702

Central States, Southeast & Southwest
Area Pension Fund
vs.
Alvin Baron, et al

JUDGMENT

This action came on for xxx (hearing) before the Court, Honorable Prentice H. Marshall, United States District Judge, presiding, and the issues having been duly xxxx (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of defendants Foy Bryant and Kathy Bryant for summary judgment is granted. Judgment will enter in favor of defendants Foy Bryant and Kathy Bryant and against plaintiffs dismissing plaintiffs' action. Defendants shall have judgment for their costs.

Dated at Chicago, Illinois, this 18th day of February, 1981.

H. STUART CUNNINGHAM
Clerk of Court

By: Rita Dumas
Deputy Clerk

AFFIDAVIT OF BRUCE RINALDI

DISTRICT OF COLUMBIA: ss

BRUCE RINALDI, being duly sworn on oath, deposes and says:

1. I am Supervisory Trial Attorney with the Special Litigation Task Force, Office of the Solicitor, Department of Labor. In my position, I am responsible for supervising litigation of the Department's civil action entitled Donovan v. Fitzsimmons, No. 78 C 342 (N.D. Ill., filed February 1, 1978).

2. The complaint in Donovan v. Fitzsimmons arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. It alleges that defendants, 18 former officials of the Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund"), breached their fiduciary obligations under ERISA by making certain imprudent loans and investments and by generally mismanaging the assets of the Pension Fund. The Secretary of Labor was granted leave to amend the complaint in Donovan v. Fitzsimmons on October 7, 1981, in order to include additional allegations of defendants' imprudence.

3. The original complaint and the amended complaint in Donovan v. Fitzsimmons specify, as examples of defentants' imprudence, certain transactions which resulted in

substantial losses to the Pension Fund. Among these transactions are two which relate to payments and other matters involving Alvin Baron, former asset manager of the Pension Fund.

4. Paragraph 6(m) and (o) of the amended complaint in Donovan v. Fitzsimmons assert as follows:

> In March 1975, the defendants caused a large sum of money in the nature of a gratuity to be paid out of plan assets to defendant Alvin Baron, who had, prior to such payment, been fully compensated for his employment by the plan, and who had no legal claim or entitlement to such payment from the plan.
>
> * * * * *
>
> Beginning at sometime after January 1, 1975 and continuing thereafter, defendant trustees failed to take steps to require defendant Alvin Baron to restore to the plan a large sum of money unlawfully paid to him in connection with a loan from the plan to the Mount Vernon Memorial Park, Inc., of Fair Oaks, California. Defendant Baron, for his part, failed to make restitution of these diverted funds.

5. Counsel for the Secretary of Labor have been aware since 1978 of a related civil action captioned Central States, Southeast and Southwest Areas Pension Fund v. Baron, No. 78 C 3702 (N.D. Ill., filed September 15, 1978). Counsel generally monitored proceedings in the Baron case because of the similar nature of the Baron and Fitzsimmons claims involving Alvin Baron, and because of the effect which recovery in Baron might

have upon defendants' financial liability in the Fitzsimmons case.

6. In mid-April 1981, counsel for the Secretary learned that plaintiff-trustees of the Pension Fund had settled and dismissed their claims against Alvin Baron in the Baron case. Counsel were advised of this fact through a discovery pleading filed by the Pension Fund in Donovan v. Fitzsimmons. The Pension Fund's pleading, in describing various collateral litigation, stated:

> On September 15, 1978 the Pension Fund commenced an action for damages entitled Central States Pension Fund et al. v. Baron et al., No. 78 C 3702 now pending before this Court, contending inter alia that Alvin Baron intentionally breached fiduciary responsibilities owed to the Pension Fund and that other defendants knowingly participated in that wrongful conduct. In 1981, while defense summary judgment motions on grounds of release and res judicata were pending, the Pension Fund entered a settlement with Alvin Baron. On February 18, 1981 United States District Judge Prentice H. Marshall (in the course of an 8-page opinion) granted the defense summary judgment motions.

Opposition Memorandum of the Central States, Southeast and Southwest Areas Pension Fund to Motion to Compel of the Secretary of Labor, at 23, 24, filed April 14, 1981 (citing Affidavit of Jack Yarbrough, Assistant Executive Director of Pension Fund). The pleading filed in the Fitzsimmons case did not indicate that the settlement in the Baron case had been entered into after summary judgment was granted against Baron and in favor of the Pension Fund.

7. Upon being advised of the settlement, counsel for the Secretary immediately contacted counsel for the Pension Fund to inquire into the reasons for and the terms of the Baron settlement. A meeting was eventually scheduled for May 7, 1981 in Chicago to discuss the settlement.

8. At the May 7, 1981 meeting, counsel for the Secretary were informed that: (a) the Baron case had been settled against Mr. Baron for approximately $67,000, to be paid over a 10-year period; (b) there had been no discovery and minimal investigation into Mr. Baron's financial condition, assets, or ability to pay a larger judgment; and (c) the settlement was motivated by the Pension Fund's concern that, under defendants' release and joint tortfeasor theories, Mr. Baron might be able to obtain dismissal, based upon the Pension Fund's settlement of earlier litigation with the Bryants, co-defendants in the Baron case.

9. Counsel for the Secretary of Labor were not advised at the May 7, 1981 meeting that summary judgment in the amount of $303,427.41 had been granted in the Pension Fund's favor and against defendant Baron, and that the case had been settled while Baron's motions to vacate and for summary judgment were pending before the Court.

10. Following the meeting, counsel for the Secretary undertook to obtain pleadings in the Baron case and to

investigate independently the legal and financial issues relating to settlement. As the investigation proceeded, certain delays were experienced, caused, in part, by the somewhat chaotic condition of the court file in the case; the absence of certain documents from the file; the need to secure various documents from third parties, including the minutes of the Pension Fund described below in paragraph 12; the need to coordinate between the Solicitor's Office in Washington, D.C. and the Department's Chicago Office, which was assisting in the investigation; and the need to research all legal issues thoroughly, so as not to "second-guess" the settlement unwarrantedly or improperly.

11. On October 22, 1981, counsel for the Secretary for the first time reviewed the Court's order of August 20, 1980 and the motions to vacate and for summary judgment, filed by defendant Baron. In its order of August 20, 1980, the Court granted summary judgment for plaintiffs against Baron, in the amount of $303,427.41, plus costs.

12. On October 27, 1981, representatives of the Department of Labor, for the first time, were given access to minutes of the Pension Fund containing information relating to settlement of the Baron case. The minutes of the January 20-21, 1981 board of trustees meeting recount, briefly, the discussions surrounding the terms of settlement, and also attach the settlement agreement between the Pension Fund and Alvin Baron. The settlement agreement is not a part of

the record in the Baron case and had not been previously available to the Department of Labor.

13. Upon learning of the Court's holding on defendant Baron's liability, acquiring copies of the trustees' minutes and the attached settlement agreement, and completing all necessary reseach, counsel for the Secretary of Labor immediately prepared papers seeking leave to intervene in the Baron case and requesting the Court to set aside its order dismissing defendant Baron.

FURTHER AFFIANT SAYETH NOT.

BRUCE RINALDI

Sworn to and subscribed before me
this 23rd day of November, 1981.

NOTARY PUBLIC

My commission expires 11-30-81

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

DEC 29 1981

PRENTICE H. MARSHALL
U. S. DISTRICT COURT JUDGE

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; and LORAN W. ROBBINS, ROBERT E. SCHLIEVE, MARION M. WINSTEAD, HAROLD J. YATES, EARL L. JENNINGS, JR., ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY and R. V. PULLIAM, SR., as Trustees of CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Plaintiffs,

v.

ALVIN BARON, FOY BRYANT and KATHY BRYANT,

Defendants.

NO. 78 C 3702

(United States District Judge
Prentice H. Marshall)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS BY THE SECRETARY FOR ORDERS GRANTING LEAVE TO INTERVENE AND VACATING ORDER OF DISMISSAL

Plaintiffs, the Trustees ("Trustees") of Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund"), submit the following memorandum in opposition to motions filed by the Secretary of Labor ("DOL") on or about November 27, 1981 asking the Court: (a) "to grant the Secretary leave to intervene as a plaintiff in this proceeding"; and (b) "to set aside its Order of February 18, 1981, dismissing defendant Alvin Baron from this action". Those DOL motions are supported by a simultaneously filed, 37-page DOL memorandum ("DOL Memo.").

STATEMENT OF MATERIAL FACTS

The record before the Court consists of the actual record of this action supplemented by an affidavit of DOL attorney Bruce Rinaldi, excerpts from minutes of two meetings of the Trustees in December, 1980 and January, 1981, and the attached affidavit of William J. Nellis. In its memorandum DOL has to some extent misstated and understated that record and expressed untenable inferences.

ARGUMENT

I. INTERVENTION SHOULD BE DENIED.

DOL justifies its intervention request, pursuant to both Rule 24(a) and Rule 24(b) of the Federal Rules of Civil Procedure ("FRCP"), upon (a) the ERISA provision that the "Secretary [of Labor] shall have the right in his discretion to intervene in any action" pursuant to Subchapter I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1145; and (b) similar though distinct monetary claims asserted by DOL against Alvin Baron ("Baron") and 17 former Trustees of the Pension Fund in Donovan v. Fitzsimmons et al., No. 78 C 342 in this district. In so doing, however, DOL disregards two material facts that diminish its intervention capacity:

(a) allegations in pleadings filed herein by the Trustees that Baron was a "fiduciary" of the Pension Fund as defined in ERISA, 29 U.S.C. §1002(21), from January 1, 1975 through March 15, 1975, were never admitted by Baron, and that ERISA prerequisite to DOL intervention remains an unresolved material fact question; and

(b) $50,000 of the $200,000 bribes to Baron from Foy Bryant and Kathy Bryant ("the Bryants") were paid in 1974, before the relevant effective date of ERISA, January 1, 1975. 29 U.S.C. §1114(a).

Timeliness is a separate reason to deny intervention. DOL received a copy of the original Complaint herein on September 19, 1978 (see attached affidavit of William J. Nellis, ¶3) but took no steps to intervene for a period exceeding three years. DOL contends that its failure to intervene in this action was linked to a plan to avoid discovery upon the related claims in the Fitzsimmons action (DOL Memo., pp. 10-11):

> ". . . the Secretary deferred further discovery and action based upon the view that the present litigation by the Pension Fund against Mr. Baron would be vigorously prosecuted, and would result in partial or total restitution to the Pension Fund of whatever losses it sustained from the Baron matters."

Informed of the 1981 settlement between the Trustees and Baron by mid-April, 1981, at least six weeks before the dismissal of Baron became final by order entered herein May 29, 1981, DOL failed to explore the settlement circumstances diligently and thoroughly, and finally has requested judicial relief in late 1981. (Some of the 1981 DOL delay is evidenced by the attached affidavit of William J. Nellis.) DOL has clearly failed to make a "timely application" for intervention, as that expression is used in Rule 24(a) and in Rule 24(b), FRCP.

DOL also maintains that its requested intervention would "not [be] prejudicial to the rights of the original parties" (DOL Memo., p. 23) but in so doing ignores the initial 1981 $10,000 settlement payment by Baron to the Pension Fund and the fact that the "original parties" have entered a valid and enforceable agreement which, except for the obligations it created, surrendered all claims and defenses of those "original parties" as asserted in this action. Despite broad ERISA investigatory power, 29 U.S.C. §1134, DOL has submitted to the Court neither evidence nor even a pleading that that agreement (and that $10,000 payment) should be rescinded.

II. THE DISMISSAL ORDER SHOULD NOT BE VACATED.

A. The Procedural Vehicle.

In its Memorandum Order dated and entered herein February 18, 1981 the Court stated in part (p. 8):

> "By agreement of the parties plaintiffs' claim against defendant Alvin Baron is dismissed with prejudice and without costs."

By motion filed herein on or about November 27, 1981 DOL is asking the Court "to set aside its Order of February 18, 1981, dismissing defendant Alvin Baron from this action", using Rule 60(b), FRCP, as the vehicle for that request. The dismissal of the claim against Baron, pursuant to Rule 41(a)(2), FRCP, followed an "agreement of the parties" (of which agreement an unsigned copy is part of APPENDIX B in the papers submitted to the Court by DOL on or about November 27, 1981) and DOL, without any in-depth investigation or evaluation of that "agreement" ("the 1981 settlement agreement") and without any request to either or both of its "parties" to rescind or modify that agreement, concludes that "the Court should set aside the dismissal order and reopen proceedings" (DOL Memo., p. 37).

In view of the sweeping DOL broadside against both the 1981 settlement agreement and the related dismissal, the Trustees do not contend that the Court is utterly powerless to entertain Rule 60(b) relief relative to its own order of dismissal. (No pleading with respect to the 1981 settlement agreement is before the Court.) The judicial discretion that is here involved, however, does operate within certain recognized perimeters (7 Moore's Federal Practice ¶60.19, pp. 237-239):

> "Where the district court has the power to act, pursuant to the provisions of Rule 60(b), relevant propositions and factors that it may consider in excercising its discretion are: the general desirability that a final judgment should not be lightly disturbed; the procedure provided by Rule 60(b) is not a substitute for an appeal; the Rule should be liberally construed for the purpose of doing substantial justice; whether, although the motion is made within the maximum time, if any, provided by the Rule, the motion is made within a reasonable time; if relief is sought from a default judgment or a judgment of dismissal where there has been no consideration of the merits, whether in the particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgments, and whether there is merit in the defense or claim, as the case may be; if relief is sought from a judgment rendered after a trial on the merits, whether the movant had a fair opportunity to present his claim or defense; whether there are any intervening equities which make it inequitable to grant relief; and any other factor that is relevant to the justice of the judgment under attack, bearing always in mind that the principle of finality of judgments serves a most useful purpose for society, the courts, and the litigants--in a word, for all concerned."

The Trustees respectfully submit that, taking into account all material circumstances, DOL has in no manner developed and presented a case that would justify Rule 60(b) relief.

B. Absence of Mistake or Excusable Neglect.

In arguing that "the settlement [agreement] and dismissal order resulted from mistaken legal views and serious misjudgments on the part of plaintiffs and their counsel" (DOL Memo., p. 25), DOL primarily confronts the affirmative defense of release as asserted by Baron in this action.[1] The classification of Baron and the Bryants as joint tortfeasors, made in that affirmative defense, is also part of the law of this case, as expressed by this Court in the denial of the initial dismissal motion by the Bryants on March 27, 1979 (pp. 2-4; emphasis added):

> "THE COURT: . . . . I think this statute [ERISA] has gotten in the way of a couple of people here. First of all, I see no reason in this case why the common law and equitable principles should not apply to render the two Bryants joint tortfeasors with Mr. Baron in his alleged violation of the fiduciary provisions of [ERISA].
>
> "Clearly, the facts which are alleged as to him accepting a commercial bribe in respect to the mortgage transaction -- clearly, that constitutes a violation of [ERISA], as well as a violation of the common law, and I think that under [ERISA] the Bryants may be joined as joint tortfeasors. Whether you call them conspirators or not is really of no great consequence, as far as I am concerned.

---

[1] On August 29, 1980 (nine days after summary judgment against him in the amount of $303,427.41 and costs), with leave of Court, Baron filed an Amendment to Answer, asserting therein the affirmative defense of release. On October 1, 1980 Baron filed a motion to vacate the August 20 order granting summary judgment against him. On October 10, 1980 Baron filed a motion for summary judgment in his favor, and a supporting memorandum.

"The complaint is couched in terms of conspiracy, but I don't feel that it needs to be. I think there is also a common law liability on the part of the Bryants on the basis of the facts alleged, and that they are liable, really, to a greater extent than the plaintiff suggests here.

"I have just finished a commercial bribery case. In fact, I have had two of them within the last year. If the Bryants in fact bribed Alvin Baron, as is alleged in the pleadings, and Alvin Baron receives any monies during the course of his trusteeship or fiduciary relationship with the pension fund, he receives those monies in behalf of the fund. Equitably, they belong to the fund, even though they may be bribes.

"And when the Bryants know that he is violating his trust, they are indebted to his cestui que trust or his principal in the amount of the bribe. It is harsh, but it is very therapeutic, and so the Bryants are liable under the facts alleged -- the Bryants are liable to Central States, not in punitive damages, but in compensatory damages for the amount of the bribe that they paid to Baron.

"Baron also, by reason of his misconduct, forfeits his right to compensation. There is a long -- well, that's almost a universal rule under both, again, common law and equitable principles. It is not as clear, however, whether the Bryants are jointly and severally liable to the Pension Fund for the $103,000 in compensation that he received after his breach of trust. In fact, that is pretty foggy, but I don't think we need to decide it on the briefs that have been submitted, because I really don't think the briefs address that question adequately.

"In short, I believe that the complaint states a claim against the Bryants under [ERISA], and against the Bryants under common law and equitable non-codified principles."

Around 17 months later, in its Memorandum Order dated and entered August 20, 1980, the Court in part denied the summary judgment motion of the Trustees against the Bryants solely because of "the Bryants' affirmative defenses of res judicata and release" (p. 3), adding that "[o]ur inclination would be to rule in favor of the Bryants on these issues but they have not sought summary judgment" (p. 5). Finally, in its Memorandum Order dated and entered February 18, 1981 the Court made it the law of this case that the Bryants were released by the Trustees (more particularly, by Victor Palmieri and Company Incorporated, as agents of the Trustees) in 1978 (p. 7; emphasis added):

> "Finally, there is the question of the release. The agreement for settlement of litigation executed by all of the parties to this action, except Baron, provides, 'The parties desire to settle and resolve the disputes between them as evidenced by the complaint and cross-complaint and the answers thereto and to permit completion of the sale described in paragraph H above.' Various provisions were thereafter recited. We are advised that the settlement agreement has been performed. As a consequence the parties resolved 'the disputes between them' as described in the complaint, cross-complaint and answers. The cross-complaint filed by Mount Vernon and Foy Bryant and the answer thereto filed by the California cross-defendants described factually the same disputes between the parties there as exist between plaintiffs and defendants here. Those disputes have been resolved by settlement. They cannot be reasserted here."

Those prior determinations by the Court greatly narrow the issue at hand: whether Baron, an undeniable joint tortfeasor with the Bryants, was entitled to the protection of the 1978 release of the Bryants.

The primary DOL response to that issue is that, in view of ERISA "fiduciary" liability and preemption, 29 U.S.C. §1109(a) and §1144(a), "plaintiffs' settlement with defendant Baron on some vague 'release of joint tortfeasors' theory makes absolutely no sense" (DOL Memo., p. 28). That DOL thesis translates to a DOL position that (a) the established common law doctrine that a release of one joint tortfeasor is a release of all cannot be applied to any claim of breach of ERISA "fiduciary" responsibility, and (b) no such ERISA breach can be the subject of a release. A major flaw in that DOL position is its tacit assumption that the Court has already established the status of Baron as an ERISA "fiduciary" during the 1975 period of his 1974-1975 breaches of trust, when the fact is that the issue of his early 1975 status is unresolved. Unless Baron was provably such an ERISA "fiduciary", and DOL has tendered no evidence on that disputed question, the terms of ERISA are immaterial. On the state of the record before the Court, then, the common law of release must prevail. A second major flaw in the DOL effort to exempt ERISA "fiduciary" claims from the established law of release (examined, to a limited extent, infra) is its inconsistency with numerous ERISA-litigation consent decrees in which DOL has participated and its lack of support by any legislative history or judicial precedent. The discharge and abandonment of a right or claim, which is the very essence of a release, is unconcerned with the nature of the right or claim, contract or tort, common law or statutory, and the election of Congress to exclude any ERISA reference to the law of release is persuasive evidence that the common law of release is intended to govern.

The secondary DOL response to the issue whether Baron was protected by the 1978 release of the Bryants begins with the premise that "Illinois law should govern" (DOL Memo., p. 30, n. 25), and the Trustees concur with that premise for two reasons: (1) the law of the place of the wrong applies, not the law of the place of the release, per rulings cited at 66 Am Jur 2d Release §45 and at 69 ALR 2d 1034; and (2) the place of the wrong is the place where the injury was suffered rather than the place where the act(s) which caused the injury was (were) committed, per rulings cited at 15A C.J.S. Conflict of Laws §12(2), pp. 459-461, and at 16 Am Jur 2d Conflict of Laws §72. The Pension Fund, an Illinois trust, and the Trustees suffered the *disloyalty*, in which the three joint tortfeasors knowingly participated, in Illinois.

This Court is of course familiar with the Illinois common law of release, having for instance ruled as follows in *Sears, Sucsy & Co.* v. *Insurance Company of No. Amer.*, 396 F. Supp. 820, 821 (N.D. Ill. E.D. 1975):

> "The rule in Illinois is well established that the *release of one joint tortfeasor acts as a release of all joint tortfeasors*. *City of Chicago* v. *Babcock*, 143 Ill. 358, 366, 32 N.E.2d 271, 273 (1892); *Anderson* v. *Martzke*, 131 Ill. App.2d 61, 66-67, 266 N.E.2d 137, 140-41 (1st Dist.1970); *Tidewell* v. *Smith*, 27 Ill.App.2d 63, 169 N.E.2d 157, 162 (2d Dist.1960). This is a harsh and much criticized rule. See W. Prosser, *Law of Torts*, §49, at 301-305 (4th ed. 1972). Nevertheless, *Illinois law on this question must be followed*. *Aiken* v. *Insull*, 122 F.2d 746, 751 (7th Cir.), *cert. denied*, 315 U.S. 806, 62 S.Ct. 638, 86 L.Ed. 1205 (1941) *reh'g denied*, 315 U.S. 829, 62 S.Ct. 904, 86 L.Ed. 1224 (1942).

> "Reviewing the plaintiff's complaint, the allegations in paragraphs 4 and 6-13 plainly allege that the three third-party-defendants conspired and schemed to defraud the plaintiff, and that their action resulted in a single injury to the firm. The allegations as well as the plaintiff's theory of the case establish that Solomon, Stein and Trainor were being charged as joint tortfeasors. See De Lude v. Rimek, 351 Ill. App. 466, 115 N.E.2d 561, 563-64 (1st Dist.1953); Osinski v. Benson, 323 Ill. App. 562, 570, 56 N.E.2d 665, 668, 669 (1st Dist.1944); Herman Berghoff Brewing Co. v. Przbylski, 82 Ill.App. 361 (1st Dist. 1899). Therefore, the release of Stein resulted in a release of Solomon and Trainor."

DOL attempts to escape the impact of Illinois release law by a suggestion that, rather than a "single injury" claim by the Trustees, this action really involved "disloyal acts of fiduciary Baron . . . separate and divisible from the acts of the Bryants; the injury . . . was separate; and the relief owed by Baron was separate and distinct. . ." (DOL Memo., p. 29). In prior rulings herein this Court has ruled otherwise, in particular the above-quoted ruling on March 27, 1979 that ". . . the Bryants may be joined as joint tortfeasors. . . . when the Bryants know that he [Baron] is violating his trust, they are indebted to his cestui que trust or his principal in the amount of the bribe. . . . It is not as clear, however, whether the Bryants are jointly and severally liable to the Pension Fund for the $103,000 in compensation that he received after his breach of trust" (pp. 2-4). The Trustees maintain that there was but a "single injury", a multi-step disloyalty in which the joint tortfeasors participated, and that the legal fiction of monetary damages[2] became fully and equally recoverable from each joint tortfeasor pursuant to established Illinois law that "[e]very joint tortfeasor is liable for all damages to which his conduct has contributed". Chmielewski v. Marich, 2 Ill. 2d 568, 571, 119 N.E.2d 247 (1954). Compare Ill. Rockford Corp. v. Kulp, 41 Ill.2d 215, 222-226, 242 N.E.2d 228 (1968).

DOL also maintains "that the Pension Fund's settlement and release agreement with the Bryants was not intended to release Mr. Baron. . . . the release granted to the Bryants does not operate to release defendant Baron--and certainly not with respect to the unrelated compensation and severance pay amounts" (DOL Memo., pp. 30-31). DOL relies upon the Supreme Court pronouncement in Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 342-348 (1971), but that ruling did not purport to construe Illinois law. DOL also points to a 1979 Illinois enactment, Ill. Rev. Stat. 1979, ch. 70, ¶301 et seq., expressly applicable "to causes of action arising on or after March 1, 1978" (three years after the disloyalty at issue here), which states in part (¶302):

> "When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the

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[2] As described by this Court in its Memorandum Order dated and entered August 20, 1980 "[t]he consequences of Baron's breach of trust are indisputable: he forfeits his right of compensation during the period of his treachery and he accounts to his principal, the Fund, for his ill-gotten gain" (p. 2).

> injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater."

That legislation does not govern the case at bar, in which the release of the Bryants did not contain any reservation of rights to proceed against Baron. Indeed the Seventh Circuit has construed Illinois release law to disregard the intention of the release parties and to void a reservation of rights in tort litigation. Aiken v. Insull, 122 F.2d 746, 751-752 (1941), cited by this Court in Sears, Sucsy at 396 F.Supp. 821. See other rulings cited at 76 C.J.S. Release §50, pp. 684-688. There having been no expression of an intent, in the release of the Bryants, to preserve the cause of action of the Trustees against Baron (circumstances remarkably similar to the release of Ben B. Stein involved before this Court in Sears, Sucsy, in which counsel for the Trustees herein represented one of the third-party defendants), there was (in late 1980 and the first six weeks of 1981) no reason for the Trustees and their counsel to believe that *if* this Court determined that the Bryants had been released in 1978[3] this Court would also determine that Baron had *not* been released in 1978, and every reason to expect the same result as in Sears, Sucsy. The recommendation to the Trustees, and the decision by the Trustees, to enter a settlement agreement with Baron is characterized by DOL as "at best a mistake or negligence and, at worst, malfeasance" (DOL Memo., p. 32). The Trustees and their counsel respectfully urge the Court to determine otherwise and to reject the belated DOL maneuver both on procedural grounds and on its lack of merit.[4]

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[3] The Court had already expressed its "inclination . . . to rule in favor of the Bryants on these issues [res judicata and release]" on August 20, 1981 (Memorandum Order, p. 5). DOL carelessly states that, in the same order, "this Court has already repudiated the 'release-of-one, release-of-all tortfeasors' theory" (DOL Memo., p. 31), when the record is clear that Baron did not raise his affirmative defense of release until later in August.

C. Absence of Misconduct or other Reason for Vacatur.

DOL argues that if Rule 60(b)(1) relief is denied, the Court should grant Rule 60(b)(3) relief or at least Rule 60(b)(6) relief (DOL Memo., pp. 33-35). The Trustees respond that the circumstances before the Court justify no such relief.

D. Timeliness.

Prior argument herein (p. 3, *supra*) and the attached affidavit of William J. Nellis demonstrate that DOL has not requested judicial relief from the dismissal of Baron within the "reasonable time" limitation of Rule 60(b), FRCP.

---

[4] DOL also chastises the Trustees and their counsel because they "conducted no formal discovery regarding Baron's financial resources. Nor, apparently, did they demand financial statements from Baron" (DOL Memo., p. 33). Having itself failed to produce evidence that would inform the Court whether this DOL issue is real or artificial, despite broad DOL investigatory authority, 29 U.S.C. §1134, and the leisurely DOL pace in seeking relief from the dismissal of Baron, DOL is hardly in a position to complain. In any event the Trustees do not agree that such intensive financial analysis is an essential element of any reasonable settlement, especially one with a defendant whose affirmative defense poses a significant threat to *any* recovery.

CONCLUSION

The Trustees repsectfully ask that the Court deny the unfounded and untimely motions by the Secretary of Labor.

Respectfully submitted,

JAMES L. COGHLAN
WILLIAM J. NELLIS

By: William J. Nellis
WILLIAM J. NELLIS

JAMES L. COGHLAN
WILLIAM J. NELLIS
COGHLAN, JOYCE AND NELLIS
Suite 4000
One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7174

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; and LORAN W. ROBBINS, ROBERT E. SCHLIEVE, MARION M. WINSTEAD, HAROLD J. YATES, EARL L. JENNINGS, JR., ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY and R. V. PULLIAM, SR., as Trustees of CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Plaintiffs,	)	
v.	)	NO. 78 C 3702
ALVIN BARON, FOY BRYANT and KATHY BRYANT, Defendants.	)	(United States District Judge Prentice H. Marshall)

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

WILLIAM J. NELLIS, being first duly sworn on oath, deposes and states as follows:

1. The affiant makes this affidavit on personal knowledge and the affiant is competent to testify to matters stated in this affidavit.

2. The affiant is an attorney and for several years has been one of the attorneys representing Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund") and its Trustees in the above-captioned *Baron* action and in other matters.

3. On September 15, 1978 the Baron action was commenced. On September 15, 1978 the affiant caused the mailing of a letter to the Secretary of Labor (certified mail number 337427), enclosing therewith a copy of the Complaint in the Baron action; a true copy of that letter is EXHIBIT A attached to this affidavit. A true copy of the return receipt of that letter, evidencing receipt on September 19, 1978, is EXHIBIT B attached to this affidavit.

4. On September 18, 1978 the affiant caused the mailing of a letter to United States District Judge Prentice H. Marshall, and enclosures therewith; a true copy of that letter is EXHIBIT C attached to this affidavit. On the same date the affiant caused the mailing of a copy of that letter to Robert P. Gallagher, an attorney of the United States Department of Labor ("DOL") having major responsibility as counsel for the Secretary of Labor in the Fitzsimmons action, No. 78 C 342 in the district of this Court.

5. The affiant participated in causing the filing in the Fitzsimmons action, and service upon counsel of record including DOL counsel, on or about April 14, 1981, of a document that disclosed the fact that "[i]n 1981, while defense summary judgment motions on grounds of release and res judicata were pending, the Pension Fund entered a settlement with Alvin Baron."

6. On May 7, 1981 the affiant attended a conference in his office library with David J. Magee and DOL attorneys Bruce Rinaldi and Richard P. Carr. The time records of the affiant (as submitted to the Pension Fund) reflect the fact that this conference lasted 1.25 hours and describe the conference as follows:

> "Re Donovan v. Fitzsimmons: conf. at CJN offices with R. Carr, B. Rinaldi and DJM re CSPF documents production in compliance with SDT and orders (mechanical problems, future production)."

It is the recollection of the affiant that this conference on May 7, 1981 was convened after reliable reports from the Pension Fund to the affiant and to David J. Magee that records of the Pension Fund (being produced to DOL, for microfilming, in compliance with a DOL deposition subpoena in the Fitzsimmons action and related protective and other orders) were being returned to the Pension Fund, after microfilming, in great disarray. It is the recollection of the affiant that, at the beginning of this conference on May 7, 1981, DOL counsel asked a few questions about the settlement between the Pension Fund and Alvin Baron ("the Baron settlement") and the affiant provided full answers to those questions, this part of the conference lasting several minutes. No documents were requested by DOL counsel during this conference on May 7, 1981.

7. The affiant has not refused or failed to provide any DOL representative any requested information or documentation about the Baron settlement at any time. All related documents, including the Agreement executed by the Trustees of the Pension Fund and by Alvin Baron, and the Promissory Note executed by Alvin Baron, would have been provided to DOL on request, but no such request has ever been expressed to the affiant.

8. The affiant has not refused or failed to provide any DOL representative any requested information or documentation about orders or developments in the Baron action at any time.

9. Between April 15, 1981 and November 24, 1981 the affiant participated in numerous telephone conversations, meetings and other activities with various DOL attorneys relative to the Pension Fund but, except for the conference described in paragraph 6 of this affidavit, the affiant can recall no questions or requests or comments in that interim, relating to the Baron settlement or to the Baron action, by any DOL attorney or other DOL representative. Those conversations, meetings and other activities by the affiant with DOL attorneys relative to the Pension Fund included:

Date:	Matter:
May 6, 1981	Telephone conversation with Bruce Rinaldi.
May 14, 1981	Telephone conversation with Richard P. Carr.
May 15, 1981	Telephone conversation with Richard P. Carr.

May 19, 1981	Telephone conversation with Richard P. Carr.
May 26, 1981	Telephone conversation with Richard P. Carr.
June 3, 1981	Participation at *Fitzsimmons* pretrial conference before Judge Moran, with DOL counsel and others.
June 5, 1981	Two telephone conversations with Richard P. Carr.
June 11, 1981	Participation at *Fitzsimmons* hearing on motion by Pension Fund, with DOL counsel and others.
June 19, 1981	Meeting with T. Timothy Ryan, Bruce Rinaldi and others.
June 23, 1981	Telephone conversations with Richard P. Carr and William Zuckerman (another DOL attorney) relative to Las Vegas actions by Morris A. Shenker ("the Shenker actions").
June 26, 1981	Telephone conversation with Richard P. Carr.
June 30, 1981	Telephone conversation with William Zuckerman (re Shenker actions).
July 7, 1981	Telephone conversation with William Zuckerman (re Shenker actions).
July 7, 1981	Telephone conversation with William Zuckerman.
July 17, 1981	Meeting with T. Timothy Ryan and others.
July 23, 1981	Meeting with T. Timothy Ryan, David H. Feldman, Bruce Rinaldi and others.
July 24, 1981	Telephone conversation with Charles Humphrey (another DOL attorney).

July 24, 1981	Telephone conversation with Bruce Rinaldi.
August 4, 1981	Meeting with T. Timothy Ryan, David H. Feldman, Bruce Rinaldi and others.
August 6-7, 1981	Participation in depositions by the Pension Fund and by DOL (in the Shenker actions), with DOL counsel and others.
August 17, 1981	Telephone conversation with T. Timothy Ryan.
August 18, 1981	Telephone conversation with William Zuckerman (re Shenker actions).
August 25, 1981	Participation at deposition by the Pension Fund and by DOL in the Shenker actions, with DOL counsel and others.
September 21, 1981	Telephone conversation with Richard O. Patterson.
September 24-25, 1981	Participation at deposition by the Pension Fund and DOL in the Shenker actions, with DOL counsel and others.
October 6, 1981	Telephone conversation with David H. Feldman and Richard O. Patterson.
October 13-14, 1981	Meetings with T. Timothy Ryan, David H. Feldman, Bruce Rinaldi and others.
October 19, 1981	Meeting with T. Timothy Ryan, David H. Feldman, Bruce Rinaldi and others.
October 23, 1981	Telephone conversation with Bruce Rinaldi.
November 3, 1981	Meeting with T. Timothy Ryan, David H. Feldman, Bruce Rinaldi and others.
November 16, 1981	Meeting with Bruce Rinaldi and others.
November 19, 1981	Participation at Fitzsimmons pretrial conference before Judge Moran, with DOL counsel and others.

Subscribed and sworn to
before me this 29th day
of December, 1981.

Notary Public

William J. Nellis

WILLIAM J. NELLIS

COGHLAN, JOYCE AND NELLIS
ATTORNEYS AT LAW
FORTIETH FLOOR
ONE NORTH LASALLE STREET
CHICAGO, ILLINOIS 60602
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JAMES L. COGHLAN
THOMAS J. JOYCE
GEORGE J. MURTAUGH, JR.
WILLIAM J. NELLIS
JOHN T. MCGRATH
JAMES E. WYNNE
RANDALL A. SPENCER
ROBERT P. NOLAN
PATRICK J. URBUT
DAVID J. MAGEE
THOMAS C. NYHAN

JOHN P. COGHLAN
1928-1968

September 15, 1978

Hon. F. Ray Marshall
U.S. Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division.

Dear Secretary Marshall:

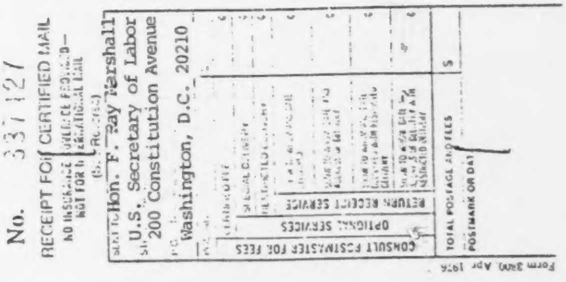
We are writing as attorneys for plaintiffs in the above civil action which was commenced today in the United States District Court in Chicago, Illinois. In compliance with 29 U.S.C. §1132(h), we hereby serve upon you a copy of the Complaint we filed in this action.

Very truly yours,

William J. Nellis

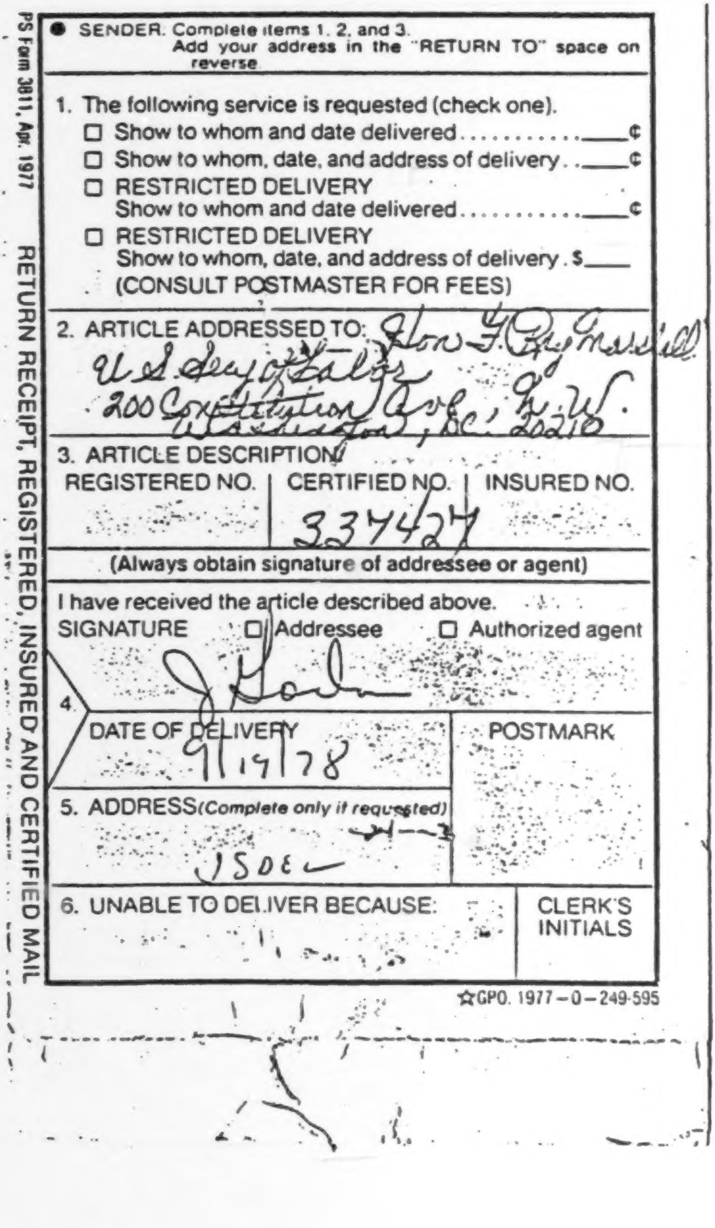
William J. Nellis

WJN/jbp
enc.
cc: Trustees of Central States,
Southeast and Southwest Areas
Pension Fund
cc: Mr. John E. Dwyer
cc: Mr. Jack Yarbrough



No. 337121
RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL
Hon. F. Ray Marshall
U.S. Secretary of Labor
200 Constitution Avenue
Washington, D.C. 20210
RETURN RECEIPT SERVICE
OPTIONAL SERVICES
CONSULT POSTMASTER FOR FEES
TOTAL POSTAGE AND FEES $
POSTMARK OR DATE
Form 3800, Apr. 1976

EXHIBIT A



PS Form 3811, Apr. 1977 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
☐ Show to whom and date delivered .... ____¢
☐ Show to whom, date, and address of delivery .. ____¢
☐ RESTRICTED DELIVERY
Show to whom and date delivered .... ____¢
☐ RESTRICTED DELIVERY
Show to whom, date, and address of delivery . $____
(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO: Hon. F. Ray Marshall
U.S. Sec'y of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	337427	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. J Godn

DATE OF DELIVERY 9/19/78

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5. ADDRESS (Complete only if requested)
24--3
JSDE

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

☆GPO. 1977-0-249-595

EXHIBIT B

COGHLAN, JOYCE AND NELLIS
ATTORNEYS AT LAW
Fortieth Floor
One North LaSalle Street
Chicago, Illinois 60602
Area Code 312/346-7174

David L. Coghlan
James L. Coghlan
Thomas J. Joyce
George J. Murtaugh, Jr.
William J. Nellis
John T. McGrath
James E. Wynne
Randall A. Spencer
Robert P. Nolan
Patrick J. Urbut
David J. Magee
Thomas C. Nyman

John P. Coghlan
1928-1968

September 18, 1978

U.S. District Judge Prentice H. Marshall
United States District Judge
Room 2388
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Re: Central States, Southeast and Southwest Areas Pension Fund et al. v. Alvin Baron, Foy Bryant and Kathy Bryant, No. 78 C 3702 in the United States District Court for the Northern District of Illinois, Eastern Division.

Dear Judge Marshall:

Enclosed is a copy of a Complaint we filed on September 15, 1978, and of the simultaneously filed designation sheet, which suggested to the Clerk that this was a "related case", within Local Rule 2.31F, to United States v. Alvin Baron, No. 76 CR 1248, tried by U.S. District Judge Hubert L. Will and a jury from May 30, 1978 through June 30, 1978, based upon identical facts and circumstances, which concluded with rulings upon post-trial motions and sentencing on September 15, 1978. Since the Clerk indicated that the new civil action would not be treated as a "related case" with respect to the earlier criminal action, absent judicial order or direction, the matter is now brought to your attention for such consideration as may be appropriate.

At the same time, we observe that the subject matter of the Complaint in the above-entitled action does have some relationship to unproven allegations set forth in paragraphs 6m and 6o of a Complaint filed February 1, 1978 in Marshall v. Fitzsimmons et al., No. 78 C 342 in this district, which has been assigned to U.S. District Judge Alfred Y. Kirkland. Accordingly, we are sending a copy of this letter, and of the Complaint in the new civil action, to the attorneys of record in the Marshall action.

Thank you very much for your consideration.

Very truly yours,

William J. Nellis

William J. Nellis

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the attached Motion of the Secretary of Labor for Leave to File Instanter and Reply Memorandum in Support of Secretary's Motions to Intervene and to Set Aside Order of Dismissal upon counsel of record for the parties in this action at the addresses shown below, by first class mail, postage prepaid, this 14th day of January 1982.

Richard P. Carr
RICHARD P. CARR
Attorney
U.S. Department of Labor

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Chicago, Illinois 60602

FILED JANUARY 15, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al., Plaintiffs, v. ALVIN BARON, et al., Defendants.	)	Civil Action No. 78 C 3702 (Marshall, J.)

REPLY MEMORANDUM OF THE SECRETARY OF LABOR IN SUPPORT OF MOTIONS TO INTERVENE AND TO SET ASIDE ORDER OF DISMISSAL

Most of the arguments raised in plaintiffs' opposition memorandum are adequately addressed in the Secretary of Labor's initial memorandum in support of his motion for leave to intervene and his motion to set aside order of dismissal. In this reply memorandum, the Secretary highlights and supplements certain contentions made in the initial memorandum, in view of plaintiffs' opposing memorandum.

ARGUMENT

The Pension Fund Did Not Release Defendant Baron Through Its Settlement of Earlier Litigation

Plaintiffs' principal argument is that the Pension Fund, by releasing the Bryants in earlier foreclosure litigation, unwittingly released defendant Baron from all claims which the Pension Fund may have had against him. The Secretary's response is threefold.

First,

> It is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action. In particular, federal law governs whether a release of one joint tortfeasor releases all for purposes of federal securities law claims. The federal rule with regard to such claims is equally well established: a release of one joint tortfeasor or coconspirator is not a release of others unless the party signing the release intended the others to be released. 1/

Since the present action arises under ERISA, and since ERISA 514(a), 29 U.S.C. 1144(a), expressly preempts State law, the Court should apply, or fashion, federal law on the matter of release.

Second, it is plain that the Pension Fund and the Bryants did not intend through their settlement agreement to release defendant Baron from potential liability. Baron was not served as a party in the foreclosure litigation. He was not a signatory to the release and settlement agreement. And, his liability was not resolved by, or encompassed within, the settlement documents. Accordingly, the settlement agreement did not work to release Baron, under either federal law or Illinois State law on the subject. 2/

1/ Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977)(citations omitted; emphasis supplied); see also Wiederhold v. Elgin, Joliet & Eastern Ry., 368 F. Supp 1054 (N.D. Ind. 1974)(detailed analysis on development of federal law regarding effect of release).

Since this action requires the application of federal law on release, rather than Illinois law, plaintiffs' citation of Sears, Sucsy & Co. v. Insurance Co. of North America, 396 F. Supp. 820 (N.D. Ill. 1975), is inapposite.

2/ See discussion in Secretary's Initial Memorandum, at 28-31 & nn. 24-26. The intent of the parties in this case not to release

(footnote cont'd)

Third, as recognized by various courts, ERISA is "a comprehensive remedial statute," which should be accorded a "liberal construction in order to carry out (its) purposes of safeguarding the interests of plan participants and beneficiaries and preserving the integrity of plan assets." 3/ Its provisions and coverage are to be interpreted generously, in favor of a plan's participants and beneficiaries, so as to effectuate ERISA's goal of "provid(ing) the maximum degree of protection to working men and women." 4/ Where there is uncertainty about an issue, as between a plan and a fiduciary of a plan, doubts and presumptions should be resolved in favor of the plan and its participants and beneficiaries. 5/ Applying these principles here, it is clear that, to the extent there is any doubt whether the 1978 settlement agreement released defendant Baron, this matter should be resolved in the Pension Fund's favor and in favor of its participants and beneficiaries.

(footnote cont'd)

defendant Baron likewise distinguishes this action from Sears, Sucsy Co., supra note 1.

It should also be pointed out, for purposes of argument, that the recent Illinois statute on the effect of releases, Ill. Ann. Stat. ch. 70, § 302(c)(Smith-Hurd 1981-82 Supp.), may well be applicable to the present case. The statute, as plaintiffs note, applies to causes of action arising on and after March 1, 1978. Defendant Baron was not convicted on kickback charges until June 1978. Arguably, this is when the Pension Fund's cause of action arose against Baron.

3/ M & R Investment Co. v. Fitzsimmons, 484 F. Supp. 1041, 1054 (D. Nev. 1980); see also Eaves v. Penn, 587 F.2d 453, 457 (10th Cir. 1978); Marshall v. Kelly, 465 F. Supp. 341, 349 (W.D. Okla. 1978).

4/ Connolly v. PBGC, 581 F.2d 729, 732 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979) (quoting Senate report on earlier version of ERISA).

5/ See Mahoney v. Union Leader Retirement Plan, 635 F.2d 27, 30 (1st Cir. 1980).

As a final matter, the lame defense relating to whether Baron was a fiduciary under ERISA is raised, not by defendant Baron but, ironically, by the Pension Fund, which ostensibly seeks to recover kickback and compensation amounts from Baron. Apart from the Pension Fund's questionable standing to assert defenses on Baron's behalf, it is incontestable that Baron was a fiduciary under ERISA and common law principles. Baron "was the asset manager of the ... Pension Fund" from at least 1973 to 1975. 6/ As such, he received and processed loan applications, attended trustees' meetings, met with borrowers, monitored loans, helped operate Pension Fund-owned properties, and made short-term investments on behalf of the Pension Fund. These matters were all established at Baron's trial and connot be denied here -- least of all by the Pension Fund. Baron's functions and activities plainly qualify him as a fiduciary under ERISA 3(21)(A)(i); i.e., one exercising "discretionary authority" and "authority or control respecting management or disposition of the (Pension Fund's) assets." 29 U.S.C. 1002(21)(A)(i). Accordingly, the defense that Baron was not a fiduciary under ERISA or common law principles is wholly without merit.

6/ United States v. Baron, 602 F.2d 1248, 1249 (7th Cir.), cert. denied, 444 U.S. 967 (1979).

CONCLUSION

For the reasons set forth in this reply memorandum as well as in the Secretary's initial memorandum, the Secretary of Labor urges the Court to grant him leave to intervene as a plaintiff in this action, to set aside its dismissal Order of February 18, 1981, and to reopen proceedings in this matter.

Respectfully submitted,

DAVID H. FELDMAN
Associate Solicitor
for Special Litigation

Richard P. Carr
RICHARD P. CARR
Attorney
U.S. Department of Labor
Office of the Solicitor
Special Litigation Task Force
P.O. Box 37296
Washington, D.C. 20013
(202) 523-7751

EDWARD J. MORAN
sistant U.S. Attorney

Mr. PICKLE. Mr. Lehr, before you leave, let me go back once more to the question I had raised, and which Mr. Jenkins had expanded upon. You are ready, willing, and able to sign an agreement for the independent asset management, provided Labor and Justice, the Government will agree to the conditions that you stipulated, that is you have some kind of a voice and that you have a comprehensive overall settlement. It sounds to me that the price you are asking for this independent asset management is for the Government to forgo or forgive or forget and cancel out the suits that are pending. There are three suits pending, the Robbins suit, McDougall, and then the Nellis suit. Now am I correct in assuming that you want those settled before you sign the consent decree?

Mr. LEHR. We want at least two of those settled, and if we can furnish the information regarding Amalgamated, we would like to have all three of those settled—and these are all under negotiation—before we can sign the consent decree. However, even if they are not settled and if there is not a consent decree, we are going to have the kind of independent asset management that has been talked about here today by the Government.

Mr. PICKLE. Yes, I think that probably will be true, and I think the Congress will help you see that that is done, so I do not know that you need to take the full leadership on that. We will meet you at the line also, when that race starts, but again now, you are asking the Government to forgo these three suits. Now the suits that are pending are suits in which funds allegedly have been misused or misspent by the trustees, and money that should go back into the fund, the trustees' fund, and if we just dismiss them, we are saying regardless of the merits or the allegations or the possible crime that could have been committed, we are going to forgo those and just blow a little perfume on them and say now let us go sign up here right quick.

Now if that is the case, here is the Robbins suit, which deals with health and welfare funds, and it pertains to Mr. Alan Dorfman, who does not have the best of character descriptions as far as the Congress is concerned, and that suit hinges on the question of overpayment to Mr. Dorfman. Now you want to dismiss that suit?

Mr. LEHR. Congressman, first of all, let me speak to three separate points, if you will. On the first two suits, on the Indico suit and on the——

Mr. PICKLE. On the airplane?

Mr. LEHR. On the airplane suit, I am not saying there will not be restoration to the fund of some moneys. If those suits were settled, there would be restoration to the fund of substantial moneys, so this is not a settlement where we would just ask that they be——

Mr. PICKLE. I understand it would be restoration based on the insurance you think it would amount to or what the fund should have? Why should the fund take less than what it should get back?

Mr. LEHR. I think there are different views as to what it should get back. This is a transaction that went for 15 years unmentioned, and I think that there is prudency in having an airplane, but rather than argue that, we would give up the airplane, and there would be restoration to the fund on that particular suit.

Mr. PICKLE. On the two that you think you might get by with, that is you could push hard enough you could get them to forgive the McDougall and the Nellis suit, but you are not asking then for the dismissal of the Dorfman suit?

Mr. **Lehr**. In connection with the Amalgamated-Dorfman transaction, the fund made a decision shortly after I came there last October, the trustees—and anything that I am saying here today, the trustees, be it good or bad, be it good anyway, deserve the credit, because I have got their support in doing it—made a decision that the fund should sever ties with Allen Dorfman. That has been a very sore point with the Government for many, many years. In order to sever ties with Allen Dorfman and Amalgamated, Arthur Young & Co. was hired to write specifications as to what it is that the Amalgamated operation had. All of our claims are processed by Amalgamated and have been since day one of the fund, on the health and welfare side.

Arthur Young wrote the specifications as to what it was that the fund should have that Allen Dorfman has. Now a price had to be put on that. We hired the largest investment firm in the United States to put that price on it, and that is Merrill Lynch. They are completing their work, and hopefully it will be done in a week to 10 days. At that time that information would be presented to the Department of Labor, because we would have to have an exemption to complete that transaction. At that time it is put in their hands as to whether or not it is approved or disapproved. We are asking that the Department of Labor review that information, signed off on by Merrill Lynch and Arthur Young—and Arthur Andersen has joined the group—and make the decision as to what is prudent at that point.

Mr. **Pickle**. Let me summarize again. These suits constitute millions of dollars for the fund, and you are willing to make just a settlement rather than to go to trial on them. You are not willing to take what Mr. Jenkins suggested, just abide by the decision of he court, sign the agreement, and then abide by the court. You do not want to do that. You want to try the case and dismiss it now.

These suits have been brought by the Government because there was strong evidence that violations of the law had occurred. Yet it seems to me that you so happily want to sign up but also want to have as your quid pro quo that they dismiss these suits, and that would bother me, and I would think that is what bothers Labor and IRS about this settlement. Maybe there are more differences ahead of us than we think. If Merrill Lynch and others can bring in evidence and you get a settlement in the next few days, that would be fine, but these are lawsuits that have been pending for some time, and we cannot seem to get the court with them.

Mr. **Lehr**. Congressman, in regard to these two suits, there are proposals on the table that would make substantial restitution to the fund, and I think there would be more money, by settling these suits, in the pockets of the participants than by trying the suits, and we happen to think that our defenses have very good merit and that there might not be any recovery by the Government. Again these are judgment calls, but in these settlements that the Department of Labor has discussed with us, they have been very tough on the question of restitution that would go back to the fund from various sources.

Mr. **Pickle**. In a light vein, I am going to tell the executive branch that in your judgment there would be more money on the table if we settled these suits now than go to trial. I am sure they will be glad to hear that. That is your opinion. But I do hope you all can work out the agreement, because it is necessary, because if you do not I think the Congress will act.

Chairman **Rangel**. I want to thank you. I think the full committee agrees that we are very optimistic about you coming to direct the fund, and we do hope that some conclusions catch up with your good reputation that you bring to trying to resolve these issues.

Could you tell us, in concluding this part of the testimony, how much the asset managers get annually for the services they provide to the fund.

Mr. **Lehr**. Directly approximately $8.5 million, and I say directly. There are indirect costs in the sense that numerous other expenses are paid for the asset managers, for example, much of the trading is done through them or those that they designate.

Mr. **Pickle**. And do you know offhand what the fund's legal fees are just as it relates to dealing with the Government in these cases annually?

Mr. **Lehr**. I can get figures for the subcommittee. The fund's total legal fees including all those paid for Equitable and Palmieri and all other legal fees and those dealing with the Government—and I am going to give you a guess that the fees from dealing with the Government are in the $3 to $4 million range annually—but total legal fees last year were $7.2 million. They will probably exceed that this year by a million or two.

[The material referred to follows:]

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS—SUMMARY OF LEGAL AND LITIGATION SERVICES BY CASE

Expenses incurred for	1981	July 1981	1981 year to date	July 1982	1982 year to date	Total to date [1]
Total contributions rec/collect	$1,258,612	$95,476	$769,935	$122,243	$684,981	*$1,943,593
Government investigations:						
Carpenter & Adcock	0	0	0	0	170,000	*170,000
Davidson v. Trustees	471,483	44,953	205,663	27,431	202,706	875,079
Donovan v. Fitzsimmons	71,684	125	23,296	5,123	22,136	282,177
Donovan v. Nellis	195,478	0	3,937	77,285	552,780	779,137
Donovan v. Robbins	52,737	7,126	33,395	11,142	32,048	238,901
Dutchak	148,647	8,560	87,940	1,284	30,481	286,966
Fitzsimmons v. Indico	11,489	0	0	1,905	16,811	114,233
IJK Nevada	119,747	11,923	87,000	5,067	28,493	292,030
M&R	134,834	10	52,317	0	440	1,620,801
McDougall v. Donovan	6,168	0	0	20,473	178,288	*184,456
Old Security	690,181	22,054	314,469	273	25,352	2,124,593
Robbins v. First American Bank	308,293	0	0	506	12,316	475,015
Shenker v. Robbins	14,550	0	0	1,362	18,233	36,614
Sullivan	42,541	2,205	30,118	1,481	19,660	71,699
U.S. v. Dorfman	706,273	0	0	64,193	624,477	*1,330,750
All other DOL	116,877	28,515	54,751	6,197	66,472	*183,349
All other IRS	46,887	9,495	12,512	3,398	12,090	*58,977
All other (less than $10,000 in 1981) [2]	21,834	0	19,110	5,477	20,413	*42,247
Total Government investigations	3,159,703	134,966	924,508	232,597	2,033,196	9,167,024

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS—SUMMARY OF LEGAL AND LITIGATION SERVICES BY CASE—Continued

Expenses incurred for	1981	July 1981	1981 year to date	July 1982	1982 year to date	Total to date [1]
Withdrawal liability:						
Johnson v. Central States	18,336	0	0	7,576	57,503	*75,839
Transport Motor Express	10,333	0	0	4,359	44,978	*55,311
All other withdrawal liability [2]	43,385	0	0	8,600	96,895	*140,280
Total withdrawal liability	72,054	0	0	20,535	199,376	*271,430
Former trustee defense	31,593	0	6,570	0	0	*31,593
Benefits	204,929	27,856	104,024	13,540	153,616	*358,545
Investments:						
Baychester	5,287	2,529	2,869	0	28,689	*33,976
Canterbury Shopping Center	12,813	784	12,813	1,814	62,302	120,914
Drake Hotel	158,398	8,269	69,581	9,150	43,395	*201,793
Pocono Downs	26,918	0	9,695	0	30,604	*57,522
Sheraton Savannah	1,550	600	738	0	27,961	*29,511
All other investments [2]	1,043,282	120,895	698,925	22,798	303,791	*1,347,073
Total investments	1,248,248	133,077	794,621	33,762	496,742	1,790,789
Committees and meetings	224,501	24,901	146,542	2,491	76,309	*300,810
Other general legal and litigation fees	1,169,235	413,547	825,235	91,250	806,872	*1,976,107
Legal and litigation services	7,368,875	829,823	3,571,435	516,418	4,451,092	15,839,891

[1] Total to date; or if an "*" in front, total 1981 and/or 1982 only.

[2] Less than $25,000 in 1982.

Prepared by Financial Group, Aug. 13, 1982.

Mr. PICKLE. It is my understanding that your staff has been working with our staff as well as the other parties, and we do not want to get involved in trying to negotiate this, but we do want to be fair, and we hope that you will continue to believe that you do have access to present your ideas. We thank you for the cooperation which you have extended us in the past, and we look forward not to working with you in the future because we hope this is behind us so that we can move on to some other areas. Thank you very much.

Mr. LEHR. Thank you, and thanks to your staff.

[The following was submitted for the record:]

COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON OVERSIGHT,
Washington, D.C., August 3, 1982.

Mr. GEORGE W. LEHR,
Executive Director, Central States, Southeast and Southwest Areas Pension Fund, Chicago, Ill.

DEAR MR. LEHR: In order to complete the record of the Oversight Subcommittee's July 26, 1982 hearing on the Central States Pension Fund reform and ERISA enforcement remedies, I request that you respond to the additional questions set forth below.

1. Is it the Pension Fund's intention to continue its relationships with the Equitable Life Assurance Society of the United States and Victor Palmieri and Company, Incorporated on the same basis as currently exists after October 3, 1982? If not, what commitment to independent asset management, free from the trustees' influencing investment policy and decisions, does the Pension Fund have after October 3?

2. After October 3, 1982, will Equitable and Palmieri, or any other asset manager, be a named fiduciary (as is Equitable) and have the same degree of independence from trustee control as Equitable and Palmieri now have?

3. Do the Pension Fund trustees intend to reassert influence or control with respect to investment policy after October 3?

4. Do the Pension Fund trustees intend to make new investments in real estate after the current asset management arrangements end on October 3? If so, in light of past abuses, what is the justification for the Pension Fund trustees involving themselves in setting investment policies allowing new real estate investments?

5. What are the Pension Fund trustees' intentions with respect to the termination provisions that will apply to its asset managers after October 3, 1982?

6. If the Pension Fund trustees can remove an asset manager without cause—and without the concurrence of the Secretary of Labor which is now required—won't the asset manager be under intolerable pressure to make investment decisions and follow investment policies dictated by the trustees?

7. Isn't it true that in 1979 the current trustees of the Pension Fund attacked the validity of the independent asset manager arrangements required by the Fund's 1977 requalification letter from the Internal Revenue Service by unilaterally attempting to reduce Victor Palmieri's fees and that the Department of Labor, in an advisory opinion, determined that the fees the pension Fund was contractually obligated to pay Palmieri were appropriate?

8. Isn't it true that in 1979 the current trustees used $3 million in Pension Fund assets to buy a jet aircraft for the trustees' use from the Central Conference of Teamsters through a strawman, in violation of ERISA's prohibited transaction strictures? In connection with the current trustees' acquisition and use of the jet plane, hasn't the Department of Labor sued the current trustees seeking their personal restoration to the Pension Fund of millions of dollars in losses resulting from this transaction and imprudence?

9. Isn't it true that in 1980 the current trustees of the Pension Fund accumulated tens of millions of dollars of excess funds in the Fund's benefits and administration account in order to settle a frivolous lawsuit brought by Morris Shenker, who owns the Dunes Hotel in Las Vegas, by giving Shenker a $91 million loan? Weren't the current trustees' efforts to improperly loan Shenker $91 million thwarted by the Department of Labor's intervention in the lawsuit and the presiding judge's decision that the loan to Shenker would constitute a prohibited transaction in violation of ERISA?

10. Isn't it true that in 1978 and 1979 the current trustees of the Pension Fund stopped cooperating with the investigations being conducted by the Department of Labor and the Internal Revenue Service and only resumed "cooperation" in compliance with subpoenas?

11. Isn't it true that current Pension Fund trustee Thomas O'Malley, former trustee and current labor relations director Amos Massa, Allen Dorfman (a former consultant to the Pension Fund and the owner of the business that processes all of the health and welfare claims for the Central States Health and Welfare Fund), in addition to Roy Williams, the President of the International Brotherhood of Teamsters, have all been indicted and are facing trial in federal court in Chicago for conspiracy to bribe Senator Howard Cannon by promising him the exclusive right to purchase Pension Fund property in Nevada at a favorable price in exchange for action by the Senator to discourage introduction and enactment of legislation to deregulate the trucking industry? Is it in the interest of Pension Fund's participants and beneficiaries to allow such persons to guard the integrity of these trust assets?

12. It has been reported in the press (Chicago Sun Times, March 28, 1982) that the Pension Fund is advancing the fees and expenses for trustee O'Malley and former trustee Massa in *United States* v. *Dorfman, et al.* How much has the defense of these alleged conspirators to bribe Senator Cannon cost the participants and beneficiaries of the Pension Fund? How can the current trustees of the Pension Fund justify this expenditure as solely in the interest of the participants and beneficiaries of the Pension Fund, as is required by ERISA?

13. The same press report (i.e., Chicago Sun Times, March 28, 1982) which quotes you Mr. Lehr, indicates that the current trustees of the Pension Fund are also advancing fees to the principal defendant in the bribery case, Allen Dorfman—a former consultant to the Pension Fund and now service provider to the Health and Welfare Fund—supposedly for the defense of Dorfman in a civil case in California, with payments running as high as $28,000 per month? How can the current trustees of the Pension Fund justify these payments as solely in the interest of the Fund's participants and beneficiaries?

14. Have the current trustees of the Pension Fund authorized the advancement of legal fees and expenses in any other cases, such as the Department of Labor's lawsuit against the current trustees involving their acquisition and use of jet aircraft and the alleged imprudent purchase of undeveloped property in Florida at a foreclo-

sure sale (*Donovan* v. *McDougall* and *Donovan* v. *Nellis*, respectively)? If so, how can the current trustees justify as solely in the interest of the Pension Fund's participants and beneficiaries the advancement of legal fees and expenses for their personal defense of ERISA litigation brought by the Government which seeks to require that the current trustees make restitution to the Fund for losses occasioned by their alleged fiduciary breaches? Don't the current trustees have a clear conflict of interest when they authorize the advancement of legal fees and expenses for their own benefit in such cases?

15. What guarantees exist that will assure that the Pension Fund's advancements of legal fees in criminal cases and in civil cases against the former and current trustees can and will be repaid with appropriate interests in the event of convictions or findings of breaches of fiduciary duties?

16. Isn't it true that Roy Williams, the President of the International Brotherhood of Teamsters, who served as a trustee of the Pension Fund until the Government forced his resignation in 1977, as a practical matter, controls the composition of the membership of the Pension Fund's current board of trustees? If this is true, as many believe, why should we expect the current trustees of the Pension Fund to act any differently than their predecessors?

17. As we understand Secretary Donovan's testimony, the current trustees of the Pension Fund have refused to enter into a consent decree that would protect its beneficiaries' hard earned pensions by, among other things, assuring continued independent asset management and adherence to other safeguards, unless the Department of Labor makes concessions and agrees to settle other litigation in which the current trustees are the defendants on terms favorable to them. This position also seems to be implicit in the status report prepared by the Pension Fund in March 1982. Isn't it true that if the Labor Department prevails in the McDougall case, involving the acquisition and use of a private jet aircraft, or the *Nellis* case, involving the purchase of property in Florida at a foreclosure sale, the current trustees may be required to repay substantial sums to the Pension Fund to make it whole for losses occasioned by their alleged fiduciary breaches? Under these circumstances, how can it be solely in the interest of the Pension Fund's participants and beneficiaries to refuse to enter into a consent decree that would clearly be protective of their interests until the Department of Labor agrees to favorable settlements of cases against the current trustees which seek their repayment of money to the Pension Fund?

18. We also understand that despite the allegations of multimillion dollar losses to the Pension Fund as a result of claimed fiduciary breaches by the former trustees, who are the defendants in the Fitzsimmons case, the current trustees are supporting the efforts of the former trustees to gain the federal court's approval of a settlement that does not require any personal contribution from the former trustees? In cases like Fitzsimmons involving the former trustees, and McDougall and Nellis involving the current trustees, aren't the interests of the Pension Fund's participants and beneficiaries best served by the Department of Labor's success in obtaining restitution to the Fund by the trustees and therefore in conflict with the personal interest of the trustees? Under these circumstances, how can the current trustees undertake to negotiate settlements that are solely in the interests of the participants and beneficiaries, as required by ERISA?

I would appreciate your responses to these questions by Tuesday, September 7, 1982. If you have any questions, please contact Rusty Guritz, Assistant Counsel of the Subcommittee staff, or Erwin Hytner, Staff Director, at (202) 225-5522.

Thank you for your cooperation in this matter and for your insightful testimony at the July 26 hearing.

Sincerely yours,

CHARLES B. RANGEL,
Chairman.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS,
Chicago, Ill., September 14, 1982.

Hon. CHARLES B. RANGEL,
Chairman, Subcommittee on Oversight, Committee on Ways and Means,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request and our discussions with your staff for additional information to complete the record of your Subcommittee's

July 26, 1982, hearing on the Central States Pension Fund reform and ERISA remedies.

We have enclosed in a question and answer format materials which were prepared at my direction with the assistance of staff and counsel and which we understand are responsive to your Committee's needs.

I very much appreciate your kind reference to my testimony at the time of the hearing, and please know that we are most willing to cooperate with you and your staff regarding any additional information you may request.

Sincerely yours,

GEORGE W. LEHR.

Enclosures.

Question No. 1. What is the Fund's position with regard to independent asset management after October 3, 1982, and what will be the relationship between the Fund and any independent asset managers?

Answer. The Trustees have every intention of continuing to utilize the services of independent asset managers as named fiduciaries for the Fund after the expiration of the current contract with the Equitable Life Assurance Society. Such fiduciaries may or may not be the same parties as the present asset managers.

It is our hope that the new arrangement will be reflected in a consent decree which will acknowledge the right of the Trustees to participate in the development of overall guidelines relating to the asset mixture of the investment portfolio as proposed to the Department of Labor by the present independent asset manager.

The guidelines relating to a mixture of investment assets will be phrased in general terms and will not relate to any specific investment decisions or involve the Trustees in day-to-day investment activity.

It is also the intention of the Trustees to provide for termination provisions in the investment management contract which will allow the Trustees to properly replace an investment manager in favor of an entity with more attractive credentials or capabilities. Any replacement manager would be selected from a list of widely-respected large investment firms and be subject to court approval. The Trustees have the duty and therefore must have the ability to obtain the services of an alternative manager if it appears that the interests of plan participants and beneficiaries would best be served. The investment manager will, of course, report to the court and/or the DOL periodically to ensure proper observance of the terms of the consent decree.

There is a legitimate need to preserve flexibilities in the investment area to ensure that needless expenditures are avoided and that the best possible investment services are secured on behalf of plan participants. In the past, for example, the Trustees questioned the fee structure imposed by Victor Palmieri and Company in view of a reduction in real estate related assets that they were managing. The Trustees sought an advisory opinion from the DOL who expressed the view that the fee structure was appropriate.

Question No. 2. Please describe the circumstances surrounding the Pension Fund's acquisition of an aircraft in 1979.

Answer. During the last sixteen years, the Pension and Welfare Funds have maintained an aircraft for the use of plan fiduciaries and staff in the performance of their duties. Prior to 1981, no allegation was ever made by the DOL or the Internal Revenue Service that the acquisition and maintenance of this type of operating asset was improper or imprudent.

In 1979, the Funds' aircraft had deteriorated to an unusable state and the Funds learned that a replacement aircraft was available from the Central Conference of Teamsters. The replacement aircraft could not be purchased from the Central Conference because such a purchase would constitute a "party in interest" transaction under ERISA. The Central Conference traded the aircraft in on the purchase of a new aircraft from Falcon Jet Corporation, and the Funds purchased the aircraft directly from the Falcon Jet Corporation.

In mid-1981, the Funds were informed by the DOL that in their opinion the acquisition of the Falcon 20 constituted a prohibited transaction because it resulted in an indirect purchase from the Central Conference. The DOL has also alleged that the expenditure of Fund assets in connection with the acquisition and operation of the aircraft was imprudent.

The matter is presently in litigation in the Federal Court in Chicago and settlement discussions are in progress.

Question No. 3. Please describe the circumstances surrounding the litigation brought by Morris Shenker involving the Dunes Hotel.

Answer. Prior to the passage of ERISA, the Pension Fund Trustees had indicated a willingness to loan $40,000,000 to the M & R Investment Company for the purpose of adding rooms to the Dunes Hotel in Las Vegas. Before the transaction was consummated, ERISA became the law and had the effect of making the loan a prohibited transaction under ERISA because one of the companies involved in the transaction—Continental Connector—was a contributing employer to the Pension Fund. Accordingly, the Pension Fund refused to make the $40,000,000 loan. M & R then sued the Pension Fund for breach of contract, seeking a court order requiring the fund to make the original loan and damages in excess of $100,000,000 as well. As the case drew near to trial in 1980, settlement negotiations took place between the parties, and the Fund agreed, subject to Court approval, to offer in settlement of the dispute a fully secured loan to M & R in the approximate amount of $91,000,000 payable over twenty-five years at an average interest rate of approximately 10.2 percent.

From the very beginning both parties to the settlement agreed that there would be no settlement without Court approval and, as a matter of fact, the proposed settlement was fully reported to the Court, the DOL, and Equitable. After the issues were thoroughly analyzed by all these parties, the Court refused to approve the settlement. The case then went to trial, the Pension Fund won the case, and it was sustained on appeal.

Question No. 4. Please state whether the Pension Fund is paying the ongoing defense costs of Thomas O'Malley and Amos Massa in *U.S.* v. *Dorfman, et al.*; if so, the amounts of such payments to date and the justification for such payments.

Answer. As of August 18, 1982, the Pension Fund had paid the ongoing defense costs of Thomas O'Malley and Amos Massa in *U.S.* v. *Dorfman, et al.* in the amount of approximately $1,252,000. Further payments have been suspended at the initiative of the Trustees for reasons and under conditions as described in the attached affidavit of George W. Lehr. The motion referred to in Mr. Lehr's affidavit was denied on September 9, 1982. The rationale and justification for making these payments prior to August 18, 1982, is set forth in the attached letter, dated June 2, 1981, to the Trustees of the Pension Fund from Fund Counsel.

Attachments.

United States District Court, Northern District of Illinois, Eastern Division, No. 81 CR 269

UNITED STATES OF AMERICA

vs.

ALLEN M. DORFMAN, ET AL.

AFFIDAVIT OF GEORGE W. LEHR

1. My name is George W. Lehr. I am the Executive Director of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, and I have been employed in that capacity since October 5, 1981. For approximately two months prior to that date I was in a transition status from my prior job and, accordingly, I am generally familiar with the business of the Funds from around mid-August, 1981. My office address is 8550 West Bryn Mawr Avenue, Chicago, Illinois 60631, and my telephone number is 312-693-5300.

2. I have prepared this Affidavit and provided it to all counsel of record in this case for the following reason. On Monday, August 30, 1982, a motion was filed entitled "Motion of Defendants Thomas O'Malley and Amos Massa for an Order Requiring the Department of Labor to Cease and Desist Interfering With Their Sixth Amendment Right to the Effective Assistance of Counsel, Their Attorney-Client Relations and Their Fifth Amendment Right to a Fair Trial." My review of this motion and the accompanying affidavit of William G. Hundley, and dialogue which I and my Counsel have had with representatives of O'Malley Massa, and the DOL during the past week indicate that there are certain areas of possible factual dispute and that I may be called to testify as to those matters. Since none of these parties has undertaken to depose me and since all have nonetheless indicated interest in and made unilateral inquiries about what my testimony would be, I have decided, in the interest of fairness, to prepare this *Affidavit* and provide it to all Counsel of Record and to Counsel for the DOL.

3. The areas of possible factual dispute which I wish to address are as follows.

The current litigation defense costs policy of the pension fund

The policy currently in effect was adopted by the Trustees on February 15, 1978 and amended by them at the Board meeting of October 20–21, 1981. Copies of the 1978 resolution and the 1981 amendment are attached hereto as Exhibits A and B respectively.

DOL knowledge of the fact that the pension fund was paying the litigation defense costs of O'Malley and Massa in this case

Pursuant to a resolution of the Trustees adopted in June, 1981, the litigation defense costs incurred by O'Malley and Massa in this case have been paid to their Counsel on an ongoing basis. These billings have usually been received on a monthly basis beginning in July or August, 1981. There has been no regular reporting of such payments to the Department of Labor, or any other government agency, by the Pension Fund, and there had been no periodic submission of copies of said billings to the Department of Labor, or any other government agency, by the Fund. To the best of my knowledge, there has been no formal notice that the Pension Fund was paying the litigation defense costs of O'Malley and Massa to the DOL, or any other government agency, either immediately after the June, 1981, resolution of the Trustee's, or at any other time. Neither Mr. O'Malley's Counsel not Mr. Massa's Counsel was ever told that their billings would be submitted to or reviewed by the DOL on a monthly basis under a formalized procedure. They were told in October, 1981, or possibly before that time, that there was no question in my mind that their billings and the general propriety of the Pension Fund paying the litigation defense costs of O'Malley and Massa would be reviewed at some future time in great detail by the Department of Labor or other interested government agencies.

While I obviously cannot state exactly when the DOL first became aware of the fact that the litigation defense costs of O'Malley and Massa were being paid by the Pension Fund, I can state, based upon an examination of Fund records, that copies of Pension Fund records relating to Wonderworld defense costs were provided DOL as follows:

January 28, 1982: Minutes approving payment of Hundley and Cacheris "O'Malley" billing through October, 1981, and minutes approving Cotisrilos and Crowley "Massa" billing through October, 1981 pursuant to Special June 4–6, 1981 Pension Fund meeting and resolution approving O'Malley and Massa request for indemnification of defense costs.

March 23, 1982: Minutes approving Hundley and Cacheris "O'Malley" billing through December, 1981 and minutes approving Cotsirilos and Crowley "Massa" billing through December, 1981 pursuant to Special June, 1981 meeting authorization.

March 26, 1982: Minutes of Special June, 1981 Pension Board meeting approving O'Malley and Massa request for indemnification of defense costs.

July 23, 1982: Copies of all *U.S.* v. *Dorfman* related billings submitted by Hundley and Cacheris (for defense of Thomas F. O'Malley) and Cotsirilos and Crowley (for defense of Amos Massa) through June 20, 1982; copy of Coghlan, Joyce and Nellis (William J. Nellis) June 2, 1981, 13-page opinion letter regarding application of the Fund's litigation defense costs policy to the O'Malley-Massa application for indemnification.

DOL attempts to have O'Malley resign or step aside as a trustee pending resolution of this case

I am informed that in Ju[illegible], 1981, prior to the time that I became involved in comprehensive settlement negotiations between the Fund and the DOL, the DOL requested that O'Malley resign or step aside as a trustee pending resolution of this case. My understanding is that this issue was raised at the first negotiating session in June, 1981, and that it was discussed again at meetings in July, and perhaps August, 1981. During the transitional period before I formally became Executive Director of the Funds, I had similar discussions with DOL officials concerning the status of O'Malley pending the outcome of the trial of this case, and I so informed Mr. O'Malley. The issue was thereafter discussed from time to time during the ongoing settlement negotiations between the Pension Fund and the DOL, but was not mentioned, to the best of my recollection, from November, 1981, until it was raised again by the DOL at a meeting on July 6, 1982, at which time T. Timothy Ryan, the Solicitor of Labor, stated that O'Malley had to be moved out as a condition precedent to the DOL entering into a consent decree with the Fund. The O'Malley "move out" demand was discussed at subsequent negotiation sessions and I so informed Mr. O'Malley and his Counsel, William G. Hundley. Mr. Hundley agreed to discuss the situation further with Mr. O'Malley. As a result of those discussions, I received a letter from Mr. O'Malley dated August 17, 1982, addressing this issue.

Circumstances surrounding the pension fund decision to suspend the payment of litigation defense costs of O'Malley and Massa

On August 18, 1982, the Trustees of the Pension Fund, after considering a number of factors, decided to suspend the payment of the litigation defense costs of O'Malley and Massa pending a judicial determination on the merits as to the propriety of continuing those payments. The factors considered by the Trustees prior to suspending payment were as follows.

(a) A public document obtained by the Pension Fund from the files of the Clerk of the District Court in the regular course of the Fund's monitoring of this action, entitled "Government's Statement Concerning Rule 404(b) and 608(b) Evidence" (hereafter called the Statement). The Pension Fund obtained a copy of the Statement in early August, 1982, and a special meeting of the Trustees was held on August 10, 1982, to discuss the Statement. Preliminary to this meeting I met with Strike Force attorneys and requested transcripts of the tape recordings described in the Statement. My request was denied. Correspondence regarding the request and denial is attached as Exhibit C.

(b) On Thursday, August 12, 1982, after a negotiation session with representatives of the DOL and IRS concerning a consent decree, I met with T. Timothy Ryan, the Solicitor of Labor; David H. Feldman, Associate Solicitor, Special Litigation Task Force; and Allen Windbourne, a representative of the IRS. I produced the Statement for the purpose of discussing it and was surprised when both the DOL and the IRS indicated that they had no prior knowledge of its existence. I was asked whether the Statement would affect the ongoing payment by the Pension Fund of the litigation defense costs of O'Malley and Massa and I responded that the Trustees would continue to evaluate the situation as they had always done pursuant to their duty of prudence under ERISA.

(c) At a Pension Fund Trustee meeting on Tuesday, August 17, 1982, Trustee Thomas F. O'Malley being absent, application of the Litigation Defense Costs Policy to a pending Cotsirilos and Crowley statement for services rendered to Amos Massa was under consideration when the meeting was recessed for lunch. During the recess I returned a telephone call David Feldman had placed from Florida that morning. Mr. Feldman asked if any action had yet been taken with respect to the O'Malley and Massa attorney bills. I replied the matter was still under consideration. Mr. Feldman stated that the DOL was very, very, very interested in what action the Trustees took and asked if I would notify him as soon as a decision was made. I responded that I would notify him as requested but that the action might not be taken until the following day.

(d) Mr. Feldman's call was immediately reported to the Trustees and I stated to the Trustees that, while Mr. Feldman had not mentioned or threatened litigation during the course of the conversation, I personally felt that, if the fees were to be approved, the DOL would take immediate legal action.

(e) The Trustees also considered correspondence received from The Public Citizen Litigation Group dated August 6, 1982 and received by the Pension Fund on August 13, 1982. A copy of that letter is attached hereto as Exhibit D.

(f) On Wednesday, August 18, 1982, the Trustees continued to consider the application of the Litigation Defense Costs Policy to the O'Malley and Massa attorney bills, Trustee Thomas F. O'Malley being absent. During the Wednesday morning meeting it was reported to the Trustees that, on August 13, 1982, Peter Wacks and Richard Huston, both Special Agents of the Federal Bureau of Investigation assigned to the Strike Force team prosecuting the indictment in this case discussed, in the presence of Robert M. Baptiste, Counsel for the IBT, the status of the DOL action against the Fund regarding the O'Malley and Massa legal fees. It was reported to the Trustees that Agent Huston had asked Agent Wacks if the Labor Department had gotten the injunction on the attorney fees. Agent Wacks was said to have responded in the negative and added that the Labor Department had not even filed as of that time. Agent Huston was reported to have reacted in a very surprised manner upon hearing the Wacks statement.

(g) In light of the above, the Trustees also took into account the possible adverse impact that continued payments might have on their fiduciary insurance.

(h) The final consideration was the Trustees' duty under ERISA to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

The Trustees do not consider that they have breached any agreement made with O'Malley, Massa, or their Counsel, but rather that they have acted prudently under all the circumstances in suspending the payments until they receive further judicial guidance. The understanding which the Trustees have reached with the DOL is reflected in a letter from me to the Solicitor of Labor, dated August 23, 1982, a copy of which is attached hereto as Exhibit E.

GEORGE W. LEHR.

[Exhibit A]

RESOLUTION

Whereas, the trust agreement of this Fund contains the following relevant provision (Article VI, Section 6):

"Sec. 6. Expenses—All proper and necessary expenses incurred by any former or incumbent Trustee, including costs of defense in litigation arising out of the Trusteeship of this Fund, and also including costs incurred by any former or incumbent Trustee in providing testimony or information about administration of this Fund in any investigation, trial or other proceeding, shall be paid out of the Trust Fund, as a matter of right of any such former or incumbent Trustee, to the extent permitted by applicable law. As used in the preceding sentence, the term 'costs' includes but is not limited to reasonable attorneys' fees."

Whereas, the U.S. Department of Labor on September 9, 1977 issued two advisory opinions, in which Internal Revenue Service concurred, relating to broad indemnification provisions in a series of contracts signed by the Trustees of Central States, Southeast and Southwest Areas Pension Fund.

Whereas, the Trustees have determined that it is in the best interest of the participants and beneficiaries of this Fund that the broad indemnification principles which have previously existed be codified by this formal resolution, in order to provide an incentive to capable and loyal individuals to retain or accept positions of responsibility in this Fund and to perform valuable services on behalf of this Fund.

Whereas, the Trustees recognize the obligations described in the above except from the trust agreement and have determined that it is appropriate to effect retroactive application to this Resolution.

Whereas, the Trustees contemplate that benefits paid pursuant to this Resolution shall be regarded as administrative expenses of this Fund.

Now, therefore, it is resolved by the Board of Trustees, in lawful meeting assembled, That, effective immediately and retroactively, the following policy is adopted:

LITIGATION DEFENSE COSTS POLICY

A. Statement of policy

1. Definition of policy coverage. The Fund shall pay reasonable costs of defense, including reasonable attorneys' fees, on behalf of any Covered Person, in any civil litigation involving an alleged Covered Act or Omission by the Covered Person.

2. Determination of policy coverage. The Trustees shall have absolute discretion and exclusive authority to determine all questions of Policy Coverage, including determination of what are reasonable costs of defense.

3. Definition of covered persons. As used herein, "Covered Person" means and includes any former or present Trustee of the Fund and any former or present officer or employee of the Fund.

4. Definition of covered acts and omissions. As used herein, "Covered Act" and "Covered Omission" means and includes any alleged act and any alleged omission during the course of service by the Covered Person and Trustee, officer or employee of the Fund (except for Exclusions described in this Policy).

5. Exclusions. (a) There shall be no Policy Coverage whatsoever to the extent a Covered Person has an exercisable right to obtain payment of his defense costs by insurance, by other indemnification or by reimbursement from any third party, and the complete absence of such other coverage must be demonstrated to the satisfaction of the Trustees before any Policy Coverage will be extended.

(b) No Policy Coverage shall be extended in defense of an allegedly dishonest act or an allegedly fraudulent and intentional act if the Covered Person has admitted his culpability or if the Trustees determine, upon review of evidence and information presented to them, that the Covered Person will probably be adjudged to have been a knowing participant in the alleged dishonesty or fraud.

B. Conditions of policy coverage.

1. Request for policy coverage. No Policy Coverage will be extended by the ees until review by them of a Request for Coverage, signed by the Covered I which shall be in a form approved by Fund counsel.

2. Cooperation. (a) As a condition of any Policy Coverage extended by the ees, the Covered Person shall cooperate with all reasonable requests by the T or their authorized representatives throughout the related litigation, includi requests that may be intended to protect the interests of the Fund as related litigation, and including the production of requested documents or informatio

(b) As a condition of any Policy Coverage extended by the Trustees, the C Person shall not relinquish or impair any rights or claims he may have ag third person, such as an insurance company, if such action would adversely the interests of the Fund.

3. Indemnity. As a condition of any Policy Coverage extended by the Truste Trustees may in certain instances require the Covered Person to execute an I nity Agreement in a form established by the Trustees.

4. Subrogation. As a condition of any Policy Coverage extended by the Trust the event of any payment pursuant to this Policy, the Fund shall be subroga the Covered Person's entire rights of recovery therefor against any person or and the Covered Person shall execute requested documents and comply with quests of the Fund in order to secure such rights, and the Covered Person sh relinquish or impair such rights.

5. Recourse. As a condition of any Policy Coverage extended by the Trustee Fund shall have a right of recourse against the Covered Person (in addition to rights), as follows: if at the conclusion of the litigation to Covered Person shal been adjudged liable or responsible for a breach of fiduciary responsibility ov participants and beneficiaries of the Fund, all Policy Coverage pursuant t Policy shall then be retroactively forfeited, and the Covered Person shall th obligated to make immediate restitution of all payments by the Fund on his plus interest thereon at an 8% annual rate, and the Fund shall have full rig recourse against the Covered Person for said amount. Enforcement of the F right of recourse against a Covered Person may be waived by the Trustees in to produce an equitable result.

[Exhibit B]

RESOLUTION

Whereas, the trust agreement of this Fund contains the following relevant sion (Article VI, Section 6):

"Sec. 6. *Expenses*—All proper and necessary expenses incurred by any form incumbent Trustee, including costs of defense in litigation arising out of the eeship of this Fund, and also including costs incurred by any former or incun Trustee in providing testimony or information about administration of this Fu any investigation, trial or other proceeding, shall be paid out of the Trust Fund matter of right of any such former or incumbent Trustee, to the extent permitt applicable law. As used in the preceding sentence, the term 'costs' includes b not limited to reasonable attorneys' fees."

Whereas, the U.S. Department of Labor on September 9, 1977 issued two adv opinions, in which Internal Revenue Service concurred, relating to broad inden cation provisions in a series of contracts signed by the Trustees of Central S Southeast and Southwest Areas Pension Fund.

Whereas, United States District Judge John Powers Crowley has issued a nu of rulings declaring the validity of broad indemnification by an employee be plan, in Case No. 77 C 4335 in the United States District Court for the Nort District of Illinois, Eastern Division.

Whereas, the Trustees have determined that it is in the best interest of the ticipants and beneficiaries of this Fund that the broad indemnification princ which have previously existed be codified by this formal resolution, in order to vide an incentive to capable and loyal individuals to retain or accept positio responsibility in this Fund and to perform valuable services on behalf of this F

Whereas, the Trustees recognize the obligations described in the above ex from the trust agreement and have determined that it is appropriate to effe retroactive application to this Resolution.

Whereas, the Trustees contemplate that benefits paid pursuant to this Resolu shall be regarded as administrative expenses of this Fund.

Now, therefore, it is resolved by the Board of Trustees, in lawful meeting assembled, That, effective immediately and retroactively, the following policy is adopted:

LITIGATION DEFENSE COSTS POLICY

A. Statement of policy

1. Definition of policy coverage. The Fund shall pay reasonable costs of defense, including reasonable attorneys' fees, on behalf of any Covered Person, in any civil or criminal litigation involving an alleged Covered Act or Omission by the Covered Person.

2. Determination of policy coverage. The Trustees shall have absolute discretion and exclusive authority to determine all questions of Policy Coverage, including determinate of what are reasonable costs of defense.

3. Definition of covered persons. As used herein, "Covered Person" means and includes any former or present Trustee of the Fund and any former or present officer or employee of the Fund.

4. Definition of covered acts and omissions. As used herein, "Covered Act" and "Covered Omission" means and includes any alleged act and any alleged omission during the course of service by the Covered Person as a Trustee, officer or employee of the Fund (except for Exclusions described in this Policy).

5. Exclusions. (a) There shall be no Policy Coverage whatsoever to the extent a Covered Person has an exercisable right to obtain payment of his defense costs by insurance, by other indemnification or by reimbursement from any third party, and the complete absence of such other coverage must be demonstrated to the satisfaction of the Trustees before any Policy Coverage will be extended.

(b) No Policy Coverage shall be extended in defense of an allegedly dishonest act or an allegedly fraudulent and intentional act if the Covered Person has admitted his culpability or if the Trustees determine, upon review of evidence and information presented to them, that the Covered Person will probably be adjudged to have been a knowing participant in the alleged dishonesty or fraud.

B. Conditions of policy coverage

1. Request for policy coverage. No Policy Coverage will be extended by the Trustees until review by them of a Request for Coverage, signed by the Covered Person, which shall be in a form approved by Fund counsel.

2. Cooperation. (a) As a condition of any Policy Coverage extended by the Trustees, the Covered Person shall cooperate with all reasonable requests by the Trustees or their authorized representatives throughout the related litigation, including any requests that may be intended to protect the interests of the Fund as related to the litigation, and including the production of requested documents or information.

(b) As a condition of any Policy Coverage extended by the Trustees, the Covered Person shall not relinquish or impair any rights or claims he may have against a third person, such as an insurance company, if such action would adversely affect the interests of the Fund.

3. Indemnity. As a condition of any Policy Coverage extended by the Trustees, the Trustees may in certain instances require the Covered Person to execute an Indemnity Agreement in a form established by the Trustees.

4. Subrogation. As a condition of any Policy Coverage extended by the Trustees, in the event of any payment pursuant to this Policy, the Fund shall be subrogated to the Covered Person's entire rights of recovery therefor against any person or entity, and the Covered Person shall execute requested documents and comply with all requests of the Fund in order to secure such rights, and the Covered Person shall not relinquish or impair such rights.

5. Recourse. As a condition of any Policy Coverage extended by the Trustees, the Fund shall have a right of recourse against the Covered Person (in addition to other rights), as follows: if at the conclusion of the litigation the Covered Person shall have been adjudged liable or responsible for a breach of fiduciary responsibility owed to participants and beneficiaries of the Fund, all Policy Coverage pursuant to this Policy shall then be retroactively forfeited, and the Covered Person shall then be obligated to make immediate restitution of all payments by the Fund on his behalf plus interest thereon at an 8% annual rate, and the Fund shall have full rights of recourse against the Covered Person for said amount. Enforcement of the Fund's right of recourse against a Covered Person may be waived by the Trustees in order to produce an equitable result.

[Exhibit C]

Coghlan, Joyce, Nellis & Kelly,
Attorneys at Law,
Chicago, Ill., August 11, 1982.

Re transcripts of recordings set forth in Government statement concerning rule 404(b) and 608(b) evidence.

Mark J. Vogel, Esq.,
Gary S. Shapiro, Esq.,
Special Litigation Chapter Strike Force,
U.S. Department of Justice, Chicago, Ill.

Gentlemen: Yesterday afternoon George Lehr advised the Trustees of the Central States Southeast and Southwest Areas Pension and Health and Welfare Funds (the "Pension" and "Health and Welfare Funds") of the morning meeting between you, George and myself. Mr. Lehr also advised the Trustees of his opinion that proper administration of both Funds requires Fund access to transcripts of tapes listed in the Government Statement Concerning Rule 404(b) and 608(b) Evidence ("Government Statement"), with proper exclusion of matters directly relating to the pending indictment and scheduled trials and material not related to Fund business. Mr. Lehr informed the Trustees that he had requested access to the subject tape transcripts. Mr. Lehr also informed the Trustees that after considering his request and discussing the matter, you stated that the Department of Justice must be bound by Judge Marshall's order not to make any disclosures regarding the tapes. The Trustees were advised that when the tapes become public documents, the transcripts will be made available to the Funds on an expedited basis.

At that point in Mr. Lehr's report, the Trustees and Mr. Lehr directed me to telephone you (I reached Gary) to inquire if the Government would oppose an effort today by the Trustees to obtain those tapes from Judge Marshall. After speaking with Gary, I advised the Trustees and Mr. Lehr that it was Gary's position that in view of the Court's order and the policy underlying that order and the imminent trial date, the Government would have to oppose a request by the Funds to obtain transcripts of any recordings set out in the Government Statement. I also conveyed to the Trustees your suggestion that they await Judge Marshall's ruling on the Government's Motion To File Under Seal Transcripts of tapes listed in the Government Statement prior to moving for a Court order permitting access. The Trustees have agreed to await Judge Marshall's ruling before taking further action.

The Trustees request that you particularly be advised that they will be meeting early next week to consider, among other matters, acquisition by the Health and Welfare Fund of the tangible assets of Amalgamated Insurance Agency, Inc. It is imperative that prior to a decision regarding acquisition or terms of acquisition, the Trustees have access to all material information that may in any way impact upon that transaction. The Trustees request that the Department of Justice confirm in writing that the transcript of the subject tapes described in the Government Statement will be made available to the Funds at the earliest possible time permitted by the Court.

Very truly yours,

James L. Coghlan.

U.S. Department of Justice, Criminal Division,
Organized Crime and Racketeering Section, Chicago Strike Force,
August 16, 1982.

Re request for access to transcripts of electronic surveillance—*United States* v. *Allen M. Dorfman, et al.*, 81 CR 269.

Mr. James L. Coghlan,
Coghlan, Joyce, Nellis & Kelly,
Chicago, Ill.

Dear Mr. Coghlan: I am in receipt of your letter of August 11, 1982, in which you seek on behalf of the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds ("Central States"), the written position of the United States Department of Justice with respect to certain transcripts of electronically intercepted conversations. As I understand your request made to Mark Vogel and myself orally on August 10, 1982, you are asking for access to the electronic surveillance transcripts which the government described in Government's Statement Concerning Rule 404(b) and 608(b) Evidence, filed on July 19, 1982, in the *United States* v. *Allen M. Dorfman, et al.*, (81 CR 269, Northern District of Illinois).

As I advised you on August 10, 1982, our position is that under existing sealing and protective orders issued by former Chief Judge James B. Parsons and Judge

Prentice H. Marshall, as well as under the restrictive disclosure provisions of Title 18, United States Code, Section 2517, the Chicago Strike Force cannot disseminate the transcripts which you seek to anyone other than parties to the pending litigation, other federal law enforcement officials, or federal grand juries. Of course, if Judge Marshall rules that these transcripts, which have been filed with the Court and which the government has requested be held under seal, should be made part of the public record in *U.S.* v. *Dorfman, et al.*, I will notify you so that you may obtain a copy. However, as you can well understand, the uncertainties of trial make it possible that these transcribed conversations may never be received in evidence, and will, therefore, not become available to Central States.

It is our view that in light of the pending criminal cases in this District, as well as various ongoing grand jury and federal law enforcement agency investigations based in part on the electronic surveillance evidence, our office would oppose any attempt of Central States to obtain court-authorized disclosure of this evidence in the Northern District of Illinois while these investigations are in progress.

Very truly yours,

GARY S. SHAPIRO,
Deputy Attorney-in-Charge.

[Exhibit D]

PUBLIC CITIZEN LITIGATION GROUP,
Washington, D.C., August 6, 1982.

Re *United States* v. *Dorfman, et al.*

Trustees, Central States, Southeast and Southwest Areas Pension Fund,
Chicago, Ill.

GENTLEMEN: Pursuant to the Employee Retirement Income Security Act and the common law of trusts, I am writing on behalf of Konstantine Petros, Robert N. Steffensen, and Clifford A. Coonley, all of whom are participants or beneficiaries of the Central States Pension Fund, to obtain certain information about the Fund's operation and to request that you take certain other actions.

In particular, we seek either a written confirmation or refutation of reports that the Fund is paying for the legal defense of certain of the defendants in the above criminal action. If the reports are correct, we also request that you furnish us with (a) the identities of the individuals whose legal defense the Fund is absorbing, (b) copies of any minutes or resolutions approving such expenditures, (c) copies of any opinion letter(s) from legal counsel on the subject, (d) copies of any retainer agreements, letters of understanding, or the like, between the Fund on the one hand, and any defendant or defendant's attorneys on the other hand reflecting the Fund's commitments in this regard, and (e) the sum of money paid, or owed, through July 31, 1982 to each defendant or his counsel to whom a commitment or payment has been made.

Whether the Fund may properly reimburse any of the defendants for their legal fees in the event they should be acquitted is not the issue at this stage of the proceedings. Once a trustee, officer, or agent of the Fund is indicated for conduct in derogation of his duties to the Fund and its beneficiaries, it is our view that you cannot, consistent with your fiduciary duties, advance any legal fees. Since, in this particular action, the defendants are alleged to have conspired to sell a parcel of Fund property in Las Vegas to Senator Howard Cannon for less than the market value, the allegations plainly involve a breach of duty to the Fund. Had the defendants succeeded in this alleged plan, they would not only have caused the Fund to sustain a loss on one of its investments, they would also have caused it to breach its agreement with the U.S. Department of Labor by undermining the asset-management authority vested in Victor Palmieri and Company. Such conduct would have been in derogation of the defendants' responsibilities to the Fund.

While it is undoubtedly true in American jurisprudence that one is innocent until proven guilty, this Constitutional principle only gives a defendant protection in a criminal case, not an immunity from all adverse consequences flowing from the indictment. For example, even though the indictment might be quashed on procedural grounds, or the defendant acquitted, he might still be liable for civil damages based on the same conduct covered by the indictment. Moreover, and more important to this inquiry, the Constitutional protection does not sanction the expenditure of trust funds on behalf of such defendants by those entrusted with high fiduciary duties to converse such funds.

Therefore, in the event that the reports are correct, we respectfully ask you to reconsider your position, to terminate all further payment of any defendant's legal defense fees, to cancel any underlying agreements providing for such payments, to take steps to recover the payments already advanced, and to advise us of your disposition of this matter as soon as you can practically do so. Obviously, with the trial scheduled to commence in approximately a month, and with the defendants' lawyers expending increased time on the case, time is of the essence. Therefore, we appreciate your prompt action and notice. Thank you.

Sincerely yours,

ARTHUR L. FOX II,
Attorney at Law.

TOLEDO, OHIO,
August 9, 1982.

Re *United States* v. *Dorfman, et al.*, defendants' legal fees.

Trustees, Central States, Southeast and Southwest Areas Pension Fund,
Chicago, Ill.

GENTLEMEN: This will confirm that I have authorized Arthur L. Fox II, an attorney associated with the Public Citizen Litigation Group in Washington, D.C., to represent me in connection with the above matter called to your attention by his letter of August 6, 1982.

Very truly yours,

KONSTANTINE PETROS.

[Exhibit E]

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Chicago, Ill., August 23, 1982.

Re *United States* v. *Dorfman, et al.*, No. 81 CR 269, in the United States District Court for the Northern District of Illinois, Eastern Division.

T. TIMOTHY RYAN, Esq.,
Solicitor of Labor, U.S. Department of Labor,
Washington, D.C.

DEAR TIM: I am writing to provide written confirmation of the commitment that the Pension Fund will not remit any additional funds in payment of attorneys' fees and other defense costs, in the above-entitled prosecution, on behalf of Thomas F. O'Malley or Andrew G. (Amos) Massa, except on a possible future occasion in which you have received ten days' prior written notice of an intention to make such remittance.

Very truly yours,

GEORGE W. LEHR,
Executive Director.

COGHLAN, JOYCE AND NELLIS,
ATTORNEYS AT LAW,
Chicago, Ill., June 2, 1981.

Re indemnification of a trustee and an employee for defense costs in *United States* v. *Allen M. Dorfman, Roy L. Williams, Joseph Lombardo, Thomas F. O'Malley, and Andrew G. Massa, also known as Amos Massa.* No. 81 CR 269 in the United States District Court for the Northern District of Illinois, Eastern Division.

To: Trustees of Central States, Southeast and Southwest Areas Pension Fund.

GENTLEMEN: This letter of opinion is directed to the question whether Thomas F. O'Malley and Andrew G. Massa are legally entitled to indemnification by the Pension Fund for reasonable costs of defense, including reasonable attorneys' fees, incurred and to be incurred by them in the criminal prosecution entitled *United States* v. *Allen M. Dorfman et al.*, No. 81 CR 269 in the United States District Court for the Northern District of Illinois, Eastern Division. In addressing that question we do not intend to make any comment or draw any inference concerning any facts, events or evidence related to that prosecution, except for references herein to the contents of certain documents.

1. PERSONS WITHIN SCOPE OF INDEMNIFICATION

Assuming for purposes of this specific part of the opinion letter than other circumstances creating a right to indemnification are present, we limit the focus here to the question whether Thomas F. O'Malley and Andrew G. Massa are persons eligible to have and enjoy such rights. As a Trustee of the Pension Fund, Thomas F.

O'Malley is in our opinion clearly eligible to exercise such a right to indemnification, for reasons explained in our opinion letter (about two Trustees of the Pension Fund) dated April 8, 1975 (copy enclosed). As an employee of the Pension Fund (just as if he were a Trustee or agent of the Pension Fund), Andrew G. Massa is in our opinion clearly eligible to exercise such a right to indemnification, for reasons explained in our opinion letter (about an agent of the Pension Fund) dated June 19, 1975 (copy enclosed). Illinois common law rulings that support those opinions include *First National Bank* v. *Tenney,* 43 Ill. App. 544, 554-558 (1st dist., 1892); *Abrams* v. *Harry A. Roth & Co.,* 310 Ill. App. 490, 493-495, 34 N.E. 2d 725 (1st dist., 1941). See also *Virginia Corp.* v. *Russ,* 27 Ill. App. 3d 608, 610-612, 327 N.E. 2d 403 (1st dist., 1975), citing Tenney and indicating that an indemnitee may press his claim to defense costs during the litigation without making " 'inroads into his own resources' ". And see *Johnston* v. *Suckow,* 55 Ill. App. 3d 277, 281, 370 N.E. 2d 650 (5th dist., 1977), citing Tenney and Abrams and concluding "that attorney's fees are properly includible as an element of an agent's expenses in defending an action brought by a third person and, therefore, ultimately recoverable by him in an action against his principal for indemnification." The status of Mr. Massa as an employee rather than an agent does not diminish his right to indemnification by his employer. See cases at 53 Am Jur 2d, Master and Servant, § 132.

2. NATURE OF INDICTMENT

As reflected in the above-cited Illinois common law rulings, and in our two prior opinion letters dated April 8 and June 19, 1975 (copies enclosed), the right to indemnification for reasonable defense costs is based upon acts and/or omissions of the indemnitee, related to the claims or charges being defended, that were lawful and authorized. It is not our purpose or province to express any evaluation or judgment of the facts, events or evidence (or of any credibility dispute that exists or may hereafter develop) other than to note the presumption of innocence that applies to Thomas F. O'Malley, Andrew G. Massa and the other defendants in this prosecution (a presumption that has some weight in your determination of the present indemnification question). In deciding whether indemnification of defense costs needs to and will be provided by the Pension Fund before and during trial, however, the Trustees cannot act in a vacuum and some factual recitation is therefore in order.

It is primary and fundamental that in the period to which the indictment speaks (generally the first six months of 1979) Mr. O'Malley and Mr. Massa each had certain fiduciary duties to the Pension Fund, the former by virtue of his appointment as Trustee and ERISA § 404(a), 29 U.S.C. § 1104(a), the latter by virtue of his employment as measured by common law and the fact that "equity will find fiduciary duties wherever one party acts on behalf of another", *Mullaney, Wells & Co.* v. *Savage,* 66 Ill. App. 3d 853, 866, 383 N.E. 2d 1270 (1st dist., 1978), and 78 Ill. 2d 534, 545-547, 402 N.E. 2d 574 (1980). According to the prosecution theory embraced in Counts III through XI of the indictment, the primary target of the alleged scheme to defraud was deprivation of compliance with those fiduciary duties,[1] it being charged in each of those counts that the purpose of the alleged scheme was (p. 8):

"(a) To defraud the Teamsters Pension Fund and its pensioners of their rights to the conscientious, loyal, faithful, disinterested, and unbiased services of Thomas F. O'Malley and Andrew G. Massa, in the performance of acts related to their official duties, functions, and employment; and

"(b) To obtain money and property by means of fraudulent pretenses and representations."

Counts III through XI of the indictment then particularize four essential components of the alleged scheme to defraud (pp. 8-9; italic added):

"3. It was part of the scheme and artifice to defraud that defendants and William E. Webbe would and did attempt to obtain an *exclusive right to purchase* the Wonderworld Property at a *specified price for Senator Howard W. Cannon* and individuals associated with him.

"4. It was further part of the scheme and artifice to defraud that defendants and William E. Webbe would and did cause individuals and entities *not associated* with Senator Howard W. Cannon *to withdraw bids made to Palmieri Company* to purchase the Wonderworld Property.

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[1] Placing fiduciary duty, most notably the duties of loyalty and disclosure (of material facts), in the centerfold of an indictment has been a common prosecutorial practice in the Northern District of Illinois, in dozens of indictments in the past ten years (against public officials, and others).

"5. It was further part of the scheme and artifice that defendants would and did *fail to disclose to Palmieri Company*, agent for the Teamsters Pension Fund, the *activities* of defendants Thomas F. O'Malley and Andrew G. Massa in *causing the withdrawal of bids* on the Wonderworld Property, which bids were *higher* than and in competition with the bids of Senator Howard W. Cannon and persons associated with him.

"6. It was further part of the scheme and artifice that defendants would and did *conceal from Palmieri Company Allen M. Dorfman's participation* in the proposed purchase of the Wonderworld Property."

Documents of Victor Palmieri and Company Incorporated have been examined and are of value in reviewing the above mere allegations in the course of deciding whether a right of indemnification exists.[2] In mounting this assault from its self-manufactured nucleus of fiduciary duty, the prosecution disregards or assumes a number of major elements:

(a) The indictment makes no note of the wholly independent authority of Palmieri in disposing of "Wonderworld", or of the undeniable fact that that independence was never invaded or impaired; and

(b) The indictment implicitly assumes that the allegedly withdrawn bids were of greater value to the Pension Fund than avoidance of, and protection of itself from, adverse legislative treatment of "proposed legislation concerning the deregulation of the trucking industry" (p. 4) [3]; and

(c) The indictment implicitly assumes that reasons for the alleged withdrawal of bids were or would have been a material fact to Palmieri in the performance of its asset management responsibilities [4]; and

(d) The indictment implicitly assumes that the alleged "participation in the proposed purchase of the Wonderworld Property", by Allen M. Dorfman, both was in fact unknown to Palmieri and was or would have been a material fact to Palmieri in the performance of its asset management responsibilities.

Those oversights and asssumptions can be examined in light of certain Palmieri documents and facts elicited therefrom (despite the inadmissible hearsay contents thereof, and without any confirmation or suggestion of the truth of any matter therein stated). On Wednesday, December 27, 1978 broker Robert J. Bjornsen reportedly telephoned Palmieri Vice President Douglas C. Fernau and advised that "[h]e has clients who may wish to make an all cash offer—$1,490,000—6 percent broker's commission. . . . [Mr. Fernau suggested to Palmieri Vice President Julian Burke that] we may wish to consider going to a bid process, since we now have four known interested parties" (12-27-78 memo. by Fernua).[5] Also on December 27 Mr. Fernau was reported told by Vern Willis of Blyth, Eastman & Dillon "that a group has been formed, led by Senator Cannon, whose intention it is to make an all cash offer within the next week or so, if the property is still for sale" (12-27-78 memo. by Fernau). In a telephone conversation on December 28, Mr. Bjornsen reportedly told Mr. Fernau "that he represents, in a broker capacity, the homeowners group headed up by Senator Cannon. Vern Willis said Bjornsen is Senator Cannon's son-in-law. . . . [Mr. Fernau told Mr. Bjornsen Palmieri was looking for the "first acceptable offer received" after January 31, 1979.] First acceptable offer is deemed to mean $1,450,000, all cash, no contingencies, 10 percent down on acceptance and closing in 60 days or less" (12-28-78 memo. by Fernau). On January 3, 1979 Mr. Fernau by telephone reportedly informed seven interested parties, including Mr. Bjornsen, that a bid solicitation letter would be sent by Palmieri to all known interested parties on January 5 (1-3-79 memo. by Fernau). The five-page bid solicitation letter, signed by Mr. Burke, was dated and mailed Monday, January 8, to Mr. Bjornsen and four others, and set an offer deadline of noon on Wednesday, January 17 at the Palmieri offices in Los Angeles (letter). At 12:04 p.m. on January 17, at those Palmieri offices, Palmieri Vice President Allan G. Lipsky and Palmieri attorney C. Graham Tebbe reportedly opened the three received "Wonderworld" offers, from: Mr. Bjornsen, Colebruck Construction & Engineering Co., Inc., and Allen R. Glick (1-17-79 memo. by Lipsky). (An offer from Marvin James Schiff was later received.) None of the offers perfectly satisfied the bid specification requirements. A memorandum from Mr. Fernau to Mr. Burke dated January 19, 1979 is marked EXHIBIT A and attached to this letter. On Tuesday, January 23, Julian Burke reportedly returned a telephone call of Allen R. Glick, and the following conversation between them took place (1-23-79 memo. by Burke):

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[2] It would be inequitable and unfair, and probably unlawful, to permit the words of an indictment selected by the prosecutor to serve his own advantage (such as conclusions about fiduciary duty) to govern the right of indemnification before and during trial, without any examination of reality.

[3] Counts I and II of the indictment concentrate on alleged steps to bribe a United States Senator (Howard W. Cannon) in violation of 18 U.S.C. § 201(b)(1). Apart from any legitimate lobbying defense as may be interposed, and other available defenses, the prosecution on these counts would fall unless there was a proven plan to give, offer or promise "anything of value" to Senator Cannon to influence his official acts. It is difficult if not impossible to perceive "anything of value" in the plan alleged in the indictment, and the inference that any steps that may have been taken were legitimate efforts to protect the Pension Fund from the adverse consequences of deregulation is persuasive.

[4] The indictment, read in its entirety, implies that Allen R. Glick withdrew his bid in late January, 1979 and that Fred Glusman withdrew his bid mid-February, 1979.

[5] Copies of the Fernau memoranda, addressed to Mr. Burke, were as a matter of course dispatched to John A. Koskinen, President of Palmieri (and on occasion to others).

". . . I told him that I wanted to speak to him about his offer on the so-called Wonder-world property. Before I could say another word he said that, as I knew, he was out of town and he had left instructions with Michael Lapin to inquire of us whether or not an offer from him would be a problem to us. I then interrupted and said I was aware of that inquiry and that he, too, knew that I was out of town, and that there were one or more conversations between Lipsky and Lapin and that Lipsky accurately expressed our view that he should feel free to make an offer on this property. I continued by saying there was some confusion, however, in the Lipsky/Lapin conversations regarding who the offeror was going to be. Apparently, Lipsky believed that Lapin was talking about Argent making an offer and, in that regard, indicated that incorporating by reference Argent's financial information would be appropriate. However, when the offer came in it was technically non-complying because it was your personal offer rather than Argent's offer and we did not have your personal financial information. I then told him that there were 3 other offers, each of which were non-complying and that, in any event, we should not spend more time discussing the technicalities of complying or non-complying, because, for better or worse, we set this process up in a very formal way and that no one technically complied. I then said that the important thing was that we had decided that it is difficult for us—that is, we would prefer not, for reasons which he would understand—to do a 'terms deal' with him. I said that I would explain why we felt that way, to which he immediately replied, 'that's not necessary, I fully understand'. He said that he would still like to make an offer and would talk to his bank this afternoon and try to make an all cash offer. He asked whether or not $1.6 million was necessary, to which I responded that I hoped that he would find no difference between the 'terms offer' he made and all cash at $1.6 million. I added that, from what I know of his financial position, there ought to be little or no difference to him between the offer he made and all cash at $1.6 million. Finally, I said that I was about to have a similar conversation with one other non-complying offeror to see whether or not I could get an improved complying offer. I told him that I would not 'shop' his deal if he made an all cash offer, but, in the meantime I was obligated to try to negotiate with other parties—at least one other—if for no other reason because we had no current offer we were willing to accept. He said he understood and would be back to me before noon tomorrow."

Also on January 23 Julian Burke reportedly initiated a lengthy telephone conversation with Mr. Bjornsen, during which Mr. Burke declined to identify "the $1.6 million offeror" but did reveal "that I expected to hear from the $1.6 million offeror by noon tomorrow. He then said that he would be back to me in the early afternoon and that he appreciated my call. He said that he would certainly try to get another offer ready for me at that time" (1-25-79 memo. by Burke). Late on Wednesday, January 24, Mr. Bjornsen reportedly telephoned Mr. Burke and "I told him that the only new development since we had last spoken was that the previous high bidders had now advised that he would pay 50 percent of his purchase price in cash and the balance 1 year later. He said that he would call me the next day and hoped to have a competing offer" (1-25-79 memo. by Burke). Not having heard anything further, Mr. Burke reportedly telephoned Mr. Bjornsen late on Thursday, January 25, and "I told him that he should call me between 9:00-9:45 AM tomorrow [January 26] because we were now at a point where we were likely going to accept another party's offer if his group did not make a more favorable approach" (1-25-79 memo. by Burke). On Friday, January 26, at a meeting of the Palmieri Investment Committee the following reportedly took place:

". . . Of the bids received, the offer of Allen Glick of $1.6 million, with 50 percent down and the balance payable in one year at 12 percent interest, was clearly the best bid. It exceeded by $150,000 the next highest proposed purchase price and provided for the largest down payment.

"The Committee approved the recommendations of Mr. Burke and Mr. Fernau that negotiations now be focused upon an attempt to convert the Glick offer into a binding contract, preferably for all cash. At the same time, and effort should be made to maintain the interest of the other bidders in the event that a binding contract with Mr. Glick does not materialize."

On Monday, January 29, there was reportedly a telephone conversation between Mr. Burke and Mr. Glick (1-30-79 letter from Burke to Glick, advising that "Wonderworld" purchase documents were being sent by Palmieri counsel to Michael L. Lapin, San Diego attorney for Mr. Glick). On January 30 Palmieri attorney Charles L. Woltman reportedly shipped those "Wonderworld" purchase documents express mail to the San Diego office of Michael L. Lapin, with copies to Mr. Glick. On Wednesday, January 31, Mr. Lapin reportedly telephoned Palmieri ". . . and left a message that Allen Glick was no longer going to proceed with the Wonderworld deal. I [Allan G. Lipsky] called Lapin back and told him that I was surprised because Glick had been so enthusiastic about the deal during our meeting with him on Monday, January 29th. Lapin told me that he too had been surprised when Glick asked him to call with the message. Lapin said that he believed Glick had met the previous day with Ben Alpert to review his personal cash needs and that Ben had advised him that the Wonderworld purchase was not feasible. Based on this Glick decided to withdraw his offer. I asked Lapin whether he felt Glick was negotiating further with us, either as to price or terms or whether this was a final decision. Lapin told me that it was his understanding that this was a final decision. He said that Glick would be willing to explain the matter further to Mr. Burke at any time" (1-31-79 memo. by Lipsky). By letter dated January 31 and addressed to Mr. Burke (received February 3 at Palmieri offices), Mr. Lapin stated:

"This is to confirm my notification to your office today that it is necessary that Allen terminate his negotiations with regard to the acquisition of the above property."

On Wednesday, February 7, Mr. Fernau reportedly received a telephone inquiry from Las Vegas attorney, George E. Graziadei who "represents a group, one member of which is Guzman (?) . . . . The Guzman group has 51 lots they are developing in the Country Club, heard we've going to rebid the property and wants to participate. . . . I advised him we have no such plans at the moment, as we are negotiating with two prior bidders. . . . I indicated that no firm deal exists currently, and that if he wishes to promptly make an offer, we will consider it if then current circumstances allow us to" (2-7-79 memo. by Fernau). In a second February 7 telephone conversation between Mr. Graziadei and Mr. Fernau, "George stated that an offer in excess of 1.4 (net) is coming in (25 percent down, 1 year, 12 percent) with a letter of credit or unconditional take down loan" (2-7-79 memo. by Fernau). On Friday, February 9, at a meeting in the Palmieri offices with Mr. Burke and Mr. Fernau, "Mr. Bjornsen delivered the written offer . . . made by Nevada Escrow Service, as Trustee, for a group of ten (10) people, one of which is Senator Cannon . . ." (2-9-79 memo. by Fernau). Also on February 9 Mr. Fernau reportedly had two telephone conversations with Mr. Graziadei: in the first "George stated that an offer would be in the mail this afternoon, express mail, with an earnest money deposit enclosed" (2-7-79 memo. by Fernau); and the second "George said his secretary mailed the offer and the check 'regular mail' . . . 1.6 million—25 percent down—balance 1 year—12 percent interest payable quarterly. 30 day close—no contingencies" (2-9-79 memo. by Fernau). The 5 partners making the offer were: Fred Gluzman and Herb Fay (owners of dress shops in the Stardust, Hilton and Tropicana), Leo Burnett (owner of Burnett Clothing Stores), Leo Margolin (contractor, building in Country Club on behalf of Mr. Gluzman), and Graziadei himself (2-9-79 memo. by Fernau). On Monday, February 12, attorney Michael L. Lapin reportedly telephoned Mr. Fernau, who reported their conversation as follows (2-12-79 memo. by Fernau):

"Mr. Lapin was calling as a favor to Mr. Gluzman as a 'reference', since Mr. Gluzman told Lapin he is making an offer on Wonderworld and wanted to be sure we took him seriously. Mr. Lapin stated: Gluzman is a successful store owner and a developer. Has stores in major casinos and has been a good tenant for Argent. Has developed and is developing in Las Vegas Country Club very successfully. Is well known by Messrs. Glick & Lapin and is well thought of in community."

On Wednesday, February 14 (the same day Palmieri attorney Charles L. Woltmann reportedly sent a set of "Wonderworld" purchase documents express mail to Mr. Bjornsen), in a telephone conversation, Mr. Graziadei reportedly told Mr. Fernau "that the financials will be collected by mid-afternoon and will be express mailed. . . . He also indicated that the ERISA representation, as requested, would pose no problem other than obtaining the signature of two members of the group who are out of town" (2-14-79 memo. by Fernau). By letter to Palmieri dated Thursday, February 15 (received February 20 at Palmieri offices), Mr. Graziadei stated:

"Please be advised that Fred Glusman and Associates, d/b/a/ Las Vegas Country Club Estates, has elected to revoke its offer to purchase the six acres of vacant property owned by the Teamsters located on Vegas Valley Drive pursuant to my letter to you of February 9, 1979.

"You are directed to return my trust check in the amount of $25,000 forthwith."

With a cover letter dated February 21, 1979, Mr. Fernau returned the check of Mr. Graziadei (letter).[6]

In the context of the preceding unconfirmed and unproven indicia of reported acts, statements and events in an eight-week period from December 27, 1978 until February 21, 1979, the question of indemnification may be addressed and decided by the Trustees. The implication of the indictment that Thomas F. O'Malley and Andrew G. Massa were disloyal to the Pension Fund because of nondisclosures of material fact (even if supported by credible evidence, of which none has been obtained) simply does not stand up to scrutiny: Palmieri was clearly aware of many of the surrounding circumstances and additional knowledge would not have produced any material change in judgments, acts or statements by Palmieri. The implication of the indictment that Thomas F. O'Malley and Andrew G. Massa were disloyal to the Pension Fund because of knowing participation in actions adverse to the interests of the Pension Fund (even if supported by credible evidence, of which none has been obtained) also does not survive scrutiny: the real interests of the Pension Fund are measured not by subjective views of the prosecution but by an honest and objective sense of reality. There is a sad public record of acts and statements by Members of Congress severely harmful to the Pension Fund and wholly unfounded in fact; it was not and is not adverse to the interests of the Pension Fund if, against that background, legitimate steps are taken to prevent opposition to the Pension Fund in matters of major importance. The Trustees, necessarily without full knowledge of all relevant circumstances because of grand jury secrecy and other governmental nondisclosures, and bound to exercise prudence "under the circumstances then prevailing", 29 U.S.C. § 1104(a), should in our opinion, in view of all known circumstances, authorize present and future indemnification of reasonable defense costs, including reasonable attorneys' fees, incurred by Thomas F. O'Malley and Andrew G. Massa before and during the trial of this indictment.

3. TIMING OF INDEMNIFICATION

Earlier common law rulings suggested that indemnification should be postponed until the indemnitee "has been vindicated on the merits. . . ." In re E. C. Warner Co., 45 N.W.2d 388, 390-394 (Minn. 1950). The United States Department of Labor, however, in its publicly issued 1977 advisory opinion expressly related to the Pension Fund, has declared that current payment of such indemnification by an employee benefit plan, if certain circumstances are present (as, in our opinion, they are here), is consistent with ERISA. Advisory Opinion Nos. C-3588A and C-3591A. United States District Judge John Powers Crowley has confirmed the legality of current indemnification in his Memorandum Opinion and Order on October 26, 1979 in *Central States, Southeast and Southwest Areas Pension Fund et al.* v. *American National Bank and Trust Company of Chicago et al.*, No. 77 C 4335 in the United States District Court for the Northern District of Illinois, Eastern Division. See in particular footnote 5 on page 15 of that ruling by Judge Crowley. Fortified by those specific ERISA precedents, we are of the opinion that current as distinct from postponed indemnification is lawful and justified in the circumstances confronting the Trustees.

4. CONCLUSION

Copies of this opinion letter are limited to yourselves for the present, plus distribution to others at the meeting during which you address this indemnification question.

Very truly yours,

WILLIAM J. NELLIS.

Question No. 5. Please state whether any litigation defense costs are being expended by the Pension Fund or the Health and Welfare Fund on behalf of Allen Dorfman.

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[6] Other acts, statements and events indicated by Palmieri inadmissible hearsay documents, including those from Feb. 22 until July 2, 1979, are relevant but not material or essential to the subject matter of this opinion letter.

Answer. The only case in which litigation defense costs are being expended on behalf of Allen Dorfman is a civil case involving the Pension Fund only, entitled *Davidson* v. *the Trustees of Central States, Southeast and Southwest Areas Pension Fund, et al.*, Los Angeles Superior Court (Case No. WEC 54705). Mr. Dorfman is a defendant in that case, having been sued for alleged acts performed while he was an agent of the Pension Fund, over ten years ago. These payments are being made pursuant to the Pension Fund's Litigation Defense Costs Policy which has been previously described in detail in a Memorandum provided to the Subcommittee on July 26, 1982.

Question No. 6. Do the Trustees of the Pension Fund have a potential conflict of interest in authorizing the ongoing payment of litigation costs on their own behalf in cases which seek to require that they make restitution to the Pension Fund for losses occasioned by their alleged breaches of fiduciary duty?

Answer. We recognize that a potential conflict does exist in any situation in which a blanket allegation of a breach of fiduciary duty, with resultant losses to the Pension Fund, is made by the government or by any one of the thousands of participants and beneficiaries of the Fund. At the present time the Pension Fund is considering various procedures for addressing this problem. This is an area in which each situation must be dealt with on an individual basis. In some cases, such as the litigation concerning the Florida property, not all of the Trustees were named as defendants and, accordingly, those not named did not have a conflict with respect to the advancement of litigation defense costs. In other cases, where all of the Trustees are involved, the ultimate test should be whether the Trustees act in good faith in evaluating their own conduct. This is a practical problem which not only the Trustees of the Pension Fund confront, but indeed one which is common to all similar funds, as well as all corporate boards of directors.

Question No. 7. Does the Pension Fund's current Litigation Defense Costs Policy provide for restitution to the Pension Fund for any litigation defense costs which are ultimately found to have been improperly paid?

Answer. Paragraph 5 of the Pension Fund's current Litigation Defense Costs Policy provides as follows:

"Recourse. As a condition of any Policy Coverage extended by the Trustees, the Fund shall have a right of recourse against the Covered Person (in addition to other rights), as follows: If at the conclusion of the litigation the Covered Person shall have been adjudged liable or responsible for a breach of fiduciary responsibility owed to participants and beneficiaries of the Fund, all Policy Coverage pursuant to this Policy shall then be retroactively forfeited, and the Covered Person shall then be obligated to make immediate restitution of all payments by the Fund on his behalf plus interest thereon at an 8% annual rate, and the Fund shall have full rights of recourse against the Covered Person for said amount. Enforcement of the Fund's right of recourse against a Covered Person may be waived by the Trustees in order to produce an equitable result."

As is explained more fully in the Memorandum provided to the Subcommittee on July 26, 1982, it is the belief of the Pension Fund that any attempt to secure advance collateralization of the restitution claim would make it virtually impossible for this Fund or any other fund to get persons to serve as Trustees or in other responsible capacities in the administration of such funds.

Question No. 8. Please describe the selection process for trustees of the Central States Pension Fund.

Answer. Article II, Section 2, of the Trust Agreement for Central States, Southeast and Southwest Areas Pension Fund provides as follows:

There is hereby created a Board of Trustees consisting of four (4) persons representative of the Employers and four (4) persons representative of the Employees. The Employer Trustees shall be designated as follows: One (1) Trustee shall be designated by each of the following Employer groups, acting either alone or jointly as herein indicated:

A. Southeastern Motor Carriers Labor Relations Association and Southwest Operators Association;

B. Cleveland Draymens Association, Inc., Northern Ohio Motor Truck Association, Inc., and Cartage Employers Management Association.

Two (2) Trustees shall be designated by the following Employer Group:

C. Motor Carriers Employers Conference—Central States.

The Employee Trustees shall be designated by the Union, as defined in Article I, Section 2 of this Agreement.

Article I, Section 2, of the Trust Agreement defines the Union as follows:

The term "Union" as used herein shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated Local Unions, and such other unions as the Trustees may agree upon.

The entities which appoint the Employer Trustees exercise their appointing authority through their respective Board of Directors except the Motor Carriers Employers Conference—Central States which provides for the appointment power to be exercised by the Chairman of the Conference.

The Employee Trustees are appointed by joint action of the respective Policy Committees of the Central Conference of Teamsters and the Southern Conference of Teamsters. The Policy Committees, consisting of seven individuals elected by Conference delegates, are the governing bodies of the respective Conferences, similar to a corporate board of directors. At the present time, the General President of the International Brotherhood of Teamsters is the Chairman of the Policy Committee of the Central Conference of Teamsters.

Article II, Section 6, of the Trust Agreement provides for the removal of Trustees as follows:

Any Employer Trustee may be removed, with or without cause, at any time by the Employer Association or Group appointing such Employer Trustee; in the event of such removal of such Employer Trustee, the Employer Association or Group removing such Trustee shall appoint a Successor Trustee. Any Employee Trustee may be removed, with or without cause, at any time by the Union. The Trustees shall also have the authority and duty to act to remove a Trustee holding office in violation of law.

Question No. 9. What is the present status of the negotiations with the Department of Labor?

Answer. It is the expectation of the Trustees that a mutually acceptable agreement, which appropriately reflects the best interests of plan participants and the Government, will be reached with the Department of Labor prior to October 3, 1982. The agreement will provide for a consent decree with institutional safeguards concerning fund administration. It is also anticipated that such consent decree will include the resolution of certain pending litigation in the interests of both plan participants and the Government.

The present climate of good faith cooperation on both sides stands as a marked improvement over the 1978–1979 period when the Fund was besieged with massive, frequently repetitive, documentational requests by the Internal Revenue Service, the Department of Justice, and the Department of Labor and had to insist upon formalistic measures, such as requesting specific subpoenas, to properly filter through and respond to redundant governmental requests.

Chairman RANGEL. Edward Densmore, Deputy Director, the Human Resource Division, General Accounting Office.

Mr. Densmore.

STATEMENT OF EDWARD A. DENSMORE, DEPUTY DIRECTOR, HUMAN RESOURCES DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY RAYMOND J. WYRSCH, SENIOR ATTORNEY, OFFICE OF GENERAL COUNSEL; AND RAYMOND KOWALSKI, SENIOR EVALUATOR, HUMAN RESOURCES DIVISION

Mr. DENSMORE. Thank you, Mr. Chairman.

Chairman RANGEL. We have your statement as well as your summary. Of course what we are concerned with are the recommendations that you made as relate to this legislation. I assume that you still believe, since no one is contesting, that it is important. You can proceed as you want, but that is really the bottom line that we are trying to get out of this hearing.

Mr. DENSMORE. Thank you, Mr. Chairman.

I would like to introduce on my left Mr. Ray Kowalski, who is a senior evaluator in the Human Resources Division in the General Accounting Office and was responsible for the work that we did in reviewing the Department of Labor's investigation of the Teamsters, and on my right is Mr. Ray Wyrsch, a senior attorney in our Office of General Counsel.

Chairman **Rangel**. They have done a very thorough job, and the committee is most appreciative.

Mr. **Densmore**. As you know, we did make a review of the Department of Labor's investigation. We issued a report in April of 1982. I will not discuss the details of that report. It is included in our testimony. I would like to just indicate that the Department of Labor and the Internal Revenue Service generally agreed with the thrust of our report and recommendations and described actions taken and being taken since early in calendar year 1981, which are in general consonance with our views and recommendations on what needs to be done. Justice and Labor also generally agreed with our recommendations on improving coordination between the two agencies.

The Teamsters' fund also commented on our draft report, and said that the trustees have stated "an unequivocal intent to enter into a consent decree which would institutionalize the concept of retaining an independent investment manager for at least a 10-year period."

The fund also stated that it is currently attempting to carry out our recommendation that it continue to use an independent investment manager as evidenced by the fact that the trustees on August 19, 1981 executed a proposed new 5-year successor agreement with Equitable.

We agree with Labor and IRS that a voluntary undertaking by the fund's trustees, incorporated in a consent decree enforceable in court, would provide the Government with an effective remedy to reform the fund. This course would also avoid litigation which probably would be protracted, costly, and time consuming for both sides. We fully agree with and support Labor's efforts.

We are encouraged by the fund's expressed intent to continue using an independent asset manager for 10 years, and its actions in proposing to renew its contracts with Equitable. However, we are concerned about some of the changes the trustees propose to make in the new agreement with Equitable and Palmieri.

In our opinion, the adoption of some of the provisions of the proposed agreement would weaken the investment managers' current agreements, and could create areas of potential abuse by the trustees.

For example, the proposed agreements would return the trustees to a substantial role in determining and developing the fund's investment policy and objectives. In addition, the proposed agreements provide for the fund, through Equitable, to embark on a new program of real estate mortgage and construction loans and investments. Theoretically, Equitable could invest 40 percent of the fund's assets in such investments. Moreover, the proposed fee arrangements with Equitable make it almost inevitable that Equitable will emphasize real estate investments over other types, such as securities, since its fees depend on the real estate it controls.

Also, the trustees will be able to more readily influence Equitable because of their greater role in setting investment policy. However, the provision which gives us the most concern is the one allowing the trustees to terminate Equitable or Palmieri with or without cause, and without the consent of Labor or IRS. In view of the attempts by the trustees to compromise Equitable's independence, and their attempts to terminate Palmieri—as documented in our report—this provision, if allowed to stand, could seriously impede long-lasting reforms at the fund.

Despite the trustees' and fund officials' cooperative attitude, the possibility exists that the fund's assets could again be subjected to misuse or mismanagement to the detriment of the pension plan participants. We believe, therefore, that Labor, in consultation with IRS, should in its negotiations with the fund, continue to insist on reforms which will remove the trustees' control over and influence on all the moneys the fund receives. We also believe Labor should insist that the fund revise the proposed agreements with Equitable to prevent the weakening of the 1977 agreements.

Labor officials recently told us that the Secretary of Labor has advised the fund's counsel that he would not approve the proposed contract with Equitable unless two key arrangements are amended. These relate to the (1) trustees' participation in modifying or replacing the fund's investment policy objectives and (2) exclusion of the provision that the trustees could terminate Equitable and Palmieri only for cause and only with the consent of the Secretary of Labor.

You requested our views, Mr. Chairman, on the July 2, 1982, letters from the Departments of the Treasury and Labor, requesting that the Committee on Ways and Means enact legislation to provide an additional ERISA remedy to better safeguard the fund's assets.

In these letters Labor and the Treasury stated that Labor has sought the fund's agreement through use of a judicially enforceable consent decree, to require future asset safeguards that would assure that the professional independent managers will continue to manage the fund's assets.

The letters stated that the trustees, notwithstanding their assurances to continue to retain independent asset managers and their agreement to such a condition in IRS' November 11, 1981, determination letter, have steadfastly refused to incorporate such a condition into a judicially enforceable consent decree. The department's letters stated, therefore, it appears that when Equitable's contract expires in October 1982, the fund's assets will likely revert back to the direct management of the fund's trustees.

Also, in commenting on our draft report, labor said it must be understood, that neither Labor nor any other Federal agency may unilaterally require—through regulation, order, or otherwise—the safeguards we recommended, such as an independent asset manager.

Labor said that there are only two ways to achieve enforceable requirements regarding such reforms: (1) a voluntary undertaking by the trustees incorporated in a consent decree, or (2) the imposition of a court order following successful litigation.

IRS commented that while it is clear that a consent decree would provide the Government with a more effective remedy against the fund, IRS has no authority under the Internal Revenue Code to secure such decrees. In addition, IRS has determined that it does not have authority to (1) enter into an enforceable contract related to the qualification requirements under the Code, or (2) commence other litigative action against the fund.

IRS' remedies against the fund are limited to disqualification and the imposition of excise taxes in cases of violations of the minimum funding or prohibited transaction requirements.

In their July 2 letters, Labor and Treasury stated that IRS' potential disqualification of the fund's tax-exempt status may not be effective in deterring the trustees from regaining control over the assets when the Equitable agreement expires. In view of the abuses in the management of the fund's assets that led to the disqualification of the fund in 1976, the departments believe that action is needed to prevent the trustees from gaining control over the $3.4 billion in assets until the trustees can demonstrate that the reversion will not be harmful to the interests of participating employees.

Labor and Treasury stated it is quite possible that similar situations could arise in the future. The Government must be able to enforce conditions which are deemed of sufficient import to be contained in these determination letters, especially if the conditions have been affirmatively accepted by or on behalf of a plan, as was the case with the fund.

Labor and Treasury have proposed that a new prohibited transaction section be enacted in both the tax and labor provisions of ERISA. Prohibited transactions refer to areas where there is considerable potential for abuse and harm to plan participants.

Labor's and Treasury's proposal would provide that where a plan accepts conditions in an IRS qualification letter—relating to the independent management of plan assets and where the trustees or administrators of the plan later violate the conditions—that such a violation would be a per se prohibited transaction. This would allow IRS to levy a tax on the amount involved in the violation against the culpable trustees and administrators, and enable Labor to seek an immediate injunction to prevent the violation.

When IRS disqualifies a plan through revocation of its tax-exempt status, the employer, the participating employees, and the plan, itself, lose the tax benefits of participating in a pension plan qualified under ERISA.

IRS recognized that its revocation of the fund's tax-exempt status in June 1976 had the potential for a substantial adverse effect on the fund's estimated 500,000 participants and beneficiaries. IRS testified at congressional hearings in August 1980 that, if the provisions of the revocation had been fully implemented, each of the employees and/or beneficiaries would have been taxed retroactively, on their individual tax returns, for some of the benefits received.

ERISA was enacted to encourage establishment of employee retirement plans and to protect the interests of plan participants. In view of the adverse consequences of disqualification on the innocent employee participants, the possible use by IRS of pension plan disqualification for ERISA abuse is not, in our opinion, the most effective remedy.

We, therefore, strongly support the intent and objective of the Departments of Labor's and Treasury's proposal to provide IRS and Labor an additional enforcement tool under ERISA to safequard multiemployer plan assets.

Mr. Chairman, this completes my statement. We would be happy to respond to any questions you or members of the subcommittee may have.

[The prepared statement follows:]

STATEMENT OF EDWARD A. DENSMORE, DEPUTY DIRECTOR, HUMAN RESOURCES DIVISION, U.S. GENERAL ACCOUNTING OFFICE

The Teamsters' Central States, Southeast and Southwest Areas Pension Fund is one of the largest private pension funds in the nation—its assets total about $3.4 billion and it had an unfunded liability of $6.05 billion at January 1, 1980.

For many years the Fund's trustees have been the subject of controversy and allegations of misusing and abusing the Fund's assets, and making questionable loans to people linked to organized crime.

The Government's investigation of the Fund started in 1975 and has cost about $8 billion. It disclosed that former Fund trustees and officials had apparently failed to carry out their fiduciary responsibilities. As a result, the Government imposed several demands on the trustees to reform the Fund.

GAO found, however, that despite apparent benefits, the Department of Labor's investigation and subsequent Labor and Internal Revenue Service dealings with Fund trustees had significant shortcomings, left numerous problems unresolved, and failed to gain lasting reforms in the Fund's operations. As a result, the agencies had to initiate a second investigation.

GAO believes that Labor and IRS should (1) assure that past mistakes are not requested in the current investigation, (2) remove the trustees' control over and influence on all moneys the Fund receives, and (3) have the Fund continue using independent asset managers to handle its assets after the current managers' contracts expire.

Labor, IRS and Justice generally agreed with the thrust of GAO's report and recommendations and described actions taken and being taken which are in general consonance with GAO's views on what needs to be done.

Labor pointed out, however, that the investigation and matters covered in the GAO report essentially deal principally with events of the mid-1970s and were essentially concluded by mid-1980. Labor also pointed out—and GAO agrees—that the report does not support to fully describe or evaluate the recent undertakings by the current administration.

GAO believes that the Congress should enact an additional safeguard under ERISA—as proposed by Labor and Treasury—to help assure that trustees and administrators of certain multiemployer pension plans comply with conditions relating to asset management which are contained in Internal Revenue Service determination letters.

STATEMENT

Mr. Chairman and members of the subcommittee, we are pleased to appear here today to discuss our reivew of the Government's investigation to reform the Teamsters' Central States, Southeast and Southwest Areas Pension Fund (the Fund)—one of the largest private pension funds in the Nation.

As of December 31, 1980, the Fund had about 505,400 participants and had about $3.1 billion in assets.[1] In 1980, employer contributions to the Fund totaled about $652 million, and pension payments totaled about $362 million.

Since the Fund's inception in 1955, its trustees have been the subject of controversy and allegations of misuse and abuse of its assets. Allegations have also been made that individuals linked to organized crime had connections with, or actually controlled, the Fund's trustees and that questionable loans had been made by the trustees to people linked to organized crime.

Over the past 14 years, various Federal agencies have investigated the Fund and the alleged misconduct by the trustees. The most recent—and probably one of the most significant and controversial—of the Government's investigations is the Department of Labor's investigation initiated in 1975. This was the first major Federal Government investigation under the Employee Retirement Income Security Act of 1974 (ERISA). At that time, the Internal Revenue Service (IRS) also had an investigation of the Fund in process which it started in about 1968.

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[1] Fund officials told us that the fund's assets had increased to $3.4 billion at Oct. 31, 1981.

At the time Labor initiated its investigation, the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs was considering its own investigation of the Fund, but deferred it because of Labor's investigation. Subsequently, the Subcommittee became concerned about the progress of Labor's investigation and requested the General Accounting Office (GAO) to comprehensively review the adequacy and effectiveness of Labor's investigation and the adequacy of its coordination with the IRS and the Department of Justice.

Highlights of GAO review

Labor's investigation of the Fund is over 6 years old and as of December 31, 1981, had cost about $8 million. IRS' and Justice's investigations are older, but the cost figures are not available.

Labor's and IRS' investigations indicated that former Fund trustees and officials had apparently mismanaged Fund assets and failed to prudently carry out their fiduciary responsibilities and had not operated the Fund for the exclusive benefit of plan participants and beneficiaries—as required by ERISA. On June 25, 1976, IRS revoked the Fund's tax-exempt status.

Before restoring the Fund's tax-exempt status, Labor and IRS in April 1977, imposed several demands on the trustees to reform the Fund's operations. The trustees agreed to the demands and made several significant changes such as the (1) appointment of independent investment managers to manage most of the Fund's assets and investments, and (2) adoption of amendments to have the Fund conform to ERISA and the Internal Revenue Code.

Also, Labor's investigation resulted in the Secretary of Labor filing a civil suit in February 1978 against 17 former trustees and two former officials to recover losses that resulted from alleged mismanagement, imprudent actions, and breaches of fiduciary duties.[2]

Our review disclosed that despite apparent benefits from the Government's investigative efforts, the investigation and subsequent dealings by Labor and IRS with the Fund's trustees had significant shortcomings and left numerous problems unresolved. We found that (1) Labor's investigation was incomplete and hampered by staffing problems, poor management and ineffective coordination between the Special Investigations Staff—which was responsible for the investigation—and the Office of the Solicitor and (2) Labor failed to adequately coordinate its investigation efforts with IRS and Justice. Most of these problems were also discussed in an internal Labor management report of May 1979—the so-called Kotch-Crino report.[3]

We also found that Labor and IRS failed (1) in their dealings and agreements with the trustees to gain lasting reforms and improvements in the Fund's operation and (2) to adequately monitor the current trustees' operations and compliance with the conditions for requalification imposed by the Government. Also, the Fund's financial soundness has improved by recent investment performance, but it is still thinly funded and had an unfunded liability of $6.05 billion (for current and future plan benefits) at January 1, 1980.[4]

The results of our review are presented in our report issued on April 28, 1982, entitled "Investigation to Reform Teamsters' Central States Pension Fund Found Inadequate" (HRD-82-13).

By letter dated July 13, 1982, you requested our views on the (1) actions of the current trustees vis-a-vis the Fund's assets and the independence of the outside asset managers, (2) need for continuing Government monitoring of the Fund and enforcement of reforms, and (3) importance of continued independent outside asset management following the expiration of the current contract on October 3, 1982. Presented below are highlights from our April 1982 report relating to the above and other issues.

Labor and IRS did not require a written agreement in restoring the fund's tax-exempt status and did not insure the fund's new trustees met stated qualifications

Labor's objective of having a Government-wide coordinated investigation did not succeed because IRS declined to participate in a joint investigation. IRS' "go-it-alone" attitude and unwillingness to join the investigaton did not adversely affect Labor's investigation until IRS decided in June 1976, without prior notice to the Fund or Labor, to revoke the Fund's tax-exempt status. IRS' action disrupted Labor's investigation and, according to Labor officials, created a "chaotic situation."

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[2] *Donovan* v. *Fitzsimmons, et al.*, C.A. 78C-342, USDC, N-D-Ill.

[3] This is a May 11, 1979, report entitled "Special Investigations Staff Review" prepared for the Deputy Assistant Secretary of Labor-Management Services Administration (LMSA) by Mr. John Kotch of the LMSA Pittsburgh Area Office and Mr. Richard Crino of the LMSA Cleveland Area Office.

[4] The unfunded accrued liability represents a pension plan's liability for pension benefits for all present members, active and retired (and their beneficiaries) and future administrative expenses in excess of the value of the plan's assets.

IRS, after coordinating with Labor, restored the Fund's tax-exempt status in April 1977. Labor and IRS had extensive discussions and considered many options—from a court-enforced "consent decree"[5] to requiring the trustees to resign and appointing a neutral board of trustees—in reforming the Fund and having IRS restore its tax-exempt status.

But, rather than have the trustees enter into a written agreement with Labor, such as a court-enforced consent decree, IRS—with Labor's approval—based the requalification on the trustees' agreement to operate the Fund in accordance with ERISA and to comply with eight specific conditions prescribed by Labor and IRS, which were included in the IRS' April 26, 1977, determination letter restoring the Fund's tax-exempt status.

We believe that a consent decree would have been a more effective remedy because Labor could have proceeded directly against the trustees in the event that the decree's terms were not complied with. A consent decree is enforceable through the issuance of a court order directing compliance with the agreed-to-terms. The failure to comply with the order may lead to the issuance of a contempt-of-court citation.

Furthermore, as a condition for requalification, the Fund agreed to Labor's and IRS' demand that the four holdover trustees resign. Labor and IRS also developed qualifications the new trustees should meet. However, Labor and IRS did not play an active role in insuring that the new trustees had met the qualifications they had developed even though Labor knew some of the former trustees—who allegedly mismanaged the Fund—were members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America union's organizations that selected some of the new trustees.

Current trustees try to reassert control over fund's assets and investments

As another condition for requalification, in June 1977, the trustees appointed independent investment managers—the Equitable Life Assurance Society of the United States and Victor Palmieri and Company, Incorporated—to handle most of the Fund's assets. Both Equitable and Palmieri appear to be successfully managing the assets and investments. As a result, the Fund's assets, managed by Equitable and Palmieri, grew from $1.6 billion to $2.9 billion at December 31, 1980, and the investment income grew from $73 million to $151 million annually.

Despite Equitable's and Palmieri's performances, the trustees have repeatedly sought to undermine the independence of Equitable and Palmieri and reassert control over the Fund's assets. For example, the trustees have (1) impeded Palmieri's attempts to sell certain Fund real estate in Las Vegas, (2) attempted to terminate Palmieri as an investment manager, and (3) had the Fund hire its own internal staff of real estate analysts—which, according to Labor, duplicated much of the investment managers' work.

Benefits and administration account not adequately monitored

Although the Fund transferred substantial funds to Equitable for investments, the Fund's trustees retained a significant amount of the Fund's income in the Benefits and Administration account (B&A account). For example, the account had $142 million at December 31, 1979. The trustees were supposed to use the B&A account to record the employers' contributions, pay the employees' benefits and the Fund's administrative expenses, and maintain an appropriate reserve for the Fund. The remaining moneys were to be given to the independent managers for investments.

Labor and IRS were responsible for monitoring the B&A account to assure the funds were prudently managed. Despite Labor officials' assurances to a congressional subcommittee, we found that Labor, as well as IRS, has not adequately monitored the trustees' control over the B&A account. As a result, in one case, the trustees apparently attempted to use the moneys to make a $91 million questionable loan to settle a court suit brought by the M&R Investment Company, Inc. which is controlled by Morris Shenker.

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[5] A consent decree is an order of preliminary or permanent injunction entered by a court of competent jurisdiction on the basis of the Government's complaint, the consent of the defendant to the entry of a decree embodying certain relief (usually without admitting or denying the allegations of the complaint), and an agreed form of judgment.

Labor and IRS did not investigate unresolved problem areas of alleged mismanagement

During its original onsite work at Fund headquarters, Labor's investigators identified patterns of apparent abuse of the Fund by former trustees which went uninvestigated. Also, IRS was not able to adequately investigate the Fund's compliance with the eight conditions of the April 1977 requalification letter. As a result, in April 1980 Labor renewed its investigation at the Fund, and IRS, after securing a court order, renewed its investigation in July 1980. We noted, however, that the investigations will not cover all of the potential areas of alleged abuse and mismanagement by the former trustees.

Pension plan is still thinly funded

The Fund's last actuary's valuation report—prepared by Dan McGinn & Associates, Inc.—in April 1981 stated that the current funding should satisfy ERISA's minimum funding standards. Our review of the report showed that the Fund's financial soundness has improved, but it still had an unfunded liability, for current and future pension benefits, of $6.05 billion at January 1, 1980.

We also believe that the plan is thinly funded and that continued annual improvements—based on gains in investment income—cannot be expected to the extent indicated by the actuary's valuation. Because the plan is apparently already liberal and because of the potential effect of events beyond the trustees' control, such as the deregulation of the trucking industry[6] and the Multiemployer Act of 1980 (Public Law 96-364, September 26, 1980), the autuary recommends a conservative posture regarding any liberalizing of benefits.

GAO recommendations

In our April 1982 report, we recommended that the Secretary of Labor and the Commissioner of Internal Revenue direct their respective investigation staffs to more closely cooperate to prevent coordination problems and duplication between the investigations. We also recommended certain actions that the Secretary and the Attorney General should take to help maintain effective coordination between Labor's and Justice's investigative staffs.

To assure that the Fund is managed prudently, we recommended that Labor, in consultation with IRS, among other things, (1) obtain an enforceable commitment (e.g., consent decree) from the trustees to consider a reorganization of the way the Fund handles and controls the employers' contributions and other income to remove the trustees' control over any of these funds and (2) retain veto power over selection of future trustees to assure they meet the Government's selection criteria and qualifications.

To help assure the financial soundness of the Fund, we recommended that the Commissioner direct IRS officials to closely monitor the Fund's financial operations to ascertain that the Fund meets the minimum funding standards of ERISA in 1981 and in the future and, if not, take whatever action is needed to assure that the Fund meets the act's requirements.

Agency and fund comments

Labor and IRS generally agreed with the thrust of our report and recommendations and described actions taken and being taken since early in calendar year 1981 which are in general consonance with our views and recommendations on what needs to be done. Justice and Labor also generally agreed with our recommendation on improving coordination between the two agencies.

Labor pointed out, however, that the investigation and matters covered in the report essentially deal principally with events of the mid-1970s and were essentially concluded by mid-1980. Labor also pointed out—and we agree—that the report does not purport to fully describe or evaluate the recent or current undertakings by the current administration.

Our analysis and evaluation of Labor's, IRS', and Justice's comments show that for the most part the agencies have taken or are taking actions on what we believe needs to be done. For example, IRS stated that coordination problems we discuss in our report have been addressed by Reorganization Plan No. 4 of 1978 and administrative actions taken by IRS and Labor. Accordingly, IRS concluded that some actions taken by its officials at that time, such as disqualifying the Fund without prior notice to Labor, would not be repeated now or in the future. We agree with IRS that its coordination problems with Labor would probably not be repeated provided Reorganization Plan No. 4 is properly implemented by both agencies.

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[6] On July 1, 1980, the Motor Carrier Act of 1980 (Public Law 96-296) was enacted which partially deregulated the trucking industry by reducing substantially Federal economic regulation over the industry.

Our analysis also shows Justice and Labor have apparently taken significant actions to improve their coordination efforts on their parallel investigations and that, if the actions and procedures are properly implemented, they should help resolve or alleviate the major coordination problems of the past and answer the recommendations in our report and the Kotch-Crino report.

IRS also said that the ERISA minimum funding standards will not become applicable to the Fund until the end of 1981, the Fund's annual report will not be due until July 1982, and the employers' contributions necessary to satisfy the minmum funding standards are not required to be made until September 15, 1982. The Commissioner said that, upon receipt, IRS expects to thoroughly examine the Fund's reports to ensure compliance with the minimum funding standards.

As a part of its monitoring, we stated our belief that IRS should review the latest actuarial report on the Fund, ascertain whether the Fund should adopt the actuary's proposal on revising or liberalizing the benefits at this time and, if so, take action to assure that the Fund implements the proposal. IRS should also monitor the progress of the various lawsuits and potential losses pending against the Fund—involving hundreds of millions of dollars—taking into consideration the possible adverse impact on the ability of the Fund to meet the minimum funding standards.

Labor and IRS concurred with the goals in our recommendations regarding selection of independent trustees, assuring that the Fund is operated and managed prudently, and reorganizing the way the Fund handles and controls the employers' contributions and other moneys to remove the trustees' control over any of these funds. Labor said, for example, it is attempting to achieve the goals in our recommendations through a comprehensive court-enforced consent decree agreeable to the Fund. Labor said, unfortunately the Fund has declined to enter into the decree unless the Government agrees to settle and terminate all civil suits against the Fund. Labor said this was unacceptable to the Government.

Labor also said it has instituted and will continue to pursue litigation to achieve the aims set forth in the recommendations. Labor said substantial resources have been and continue to be invested in the cases which surround the Central States Teamsters' Pension and Health and Welfare Funds. Labor said litigation is generally a protracted process and it is particularly so here where the present and former trustees and the Fund are represented by experienced counsel, who have missed no opportunity to contest every claim, request, or motion (including those seeking discovery) brought by Labor.

IRS and Labor stated also that they continue to believe in the importance of having most Fund assets subject to the control of independent asset managers. IRS said that, after coordinating with Labor, on November 11, 1981, IRS issued a new determination letter to the Fund that included a condition requiring the continuation of an independent asset manager arrangement. IRS also said that its November 11 letter contains a condition limiting assets retained by the Fund to those the Fund actually determines are necessary for benefits and administrative expenses in the B&A account considering assets available from the independent managers. IRS said that the Fund has agreed to this determination letter.

The Fund also commented on our draft report and it said that the trustees have stated an unequivocal intent to enter into a consent decree which would institutionalize the concept of retaining an independent investment manager for at least a 10-year period. The Fund also stated that it is currently attempting to carry out our recommendation that it continue to use an independent investment manager as evidenced by the fact that the trustees on August 19, 1981, executed a proposed new 5-year successor agreement with Equitable.

We agree with Labor and IRS that a voluntary undertaking by the Fund's trustees, incorporated in a consent decree enforceable in court, would provide the Government with an effective remedy to reform the Fund. This course would also avoid litigation which probably would be protracted, costly, and time consuming for both sides. We fully agree with and support Labor's efforts.

We are encouraged by the Fund's expressed intent to continue using an independent asset manager for 10 years and its actions in proposing to renew its contracts with Equitable. However, we are concerned about some of the changes the trustees propose to make in the new agreement with Equitable and Palmieri. (See the appendix for a comparison of the 1977 and proposed new agreements.)

GAO concerns about proposed new investment manager agreements

In our opinion, the adoption of some of the provisions of the proposed agreement would weaken the investment managers' current agreements and could create areas of potential abuse by the trustees. For example, the proposed agreements would return the trustees to a substantial role in determining and developing the Fund's investment policy and objectives.

In addition, the proposed agreements provide for the Fund, through Equitable, to embark on a new program of real estate, mortgage and construction loans, and investments. Theoretically, Equitable could invest 40 percent of the Fund's assets in such investments. Moreover, the proposed fee arrangements with Equitable make it almost inevitable that Equitable will emphasize real estate investments over other types, such as securities, since its fees depend on the real estate it controls.

The Fund appears to be returning to real estate mortgage type investments, the area in which most of the alleged abuses by former trustees occurred. Also, the trustees will be able to more readily influence Equitable because of its greater role in setting investment policy.

However, the provision which gives us the most concern is the one allowing the trustees to terminate Equitable or Palmieri with or without cause and without the consent of Labor or IRS. In view of the attempts by the trustees to compromise Equitable's independence and their attempts to terminate Palmieri—as documented in our report—this provision, if allowed to stand, could seriously impede long-lasting reforms at the Fund. Despite the trustees' and Fund officials' cooperative attitude, the possibility exists that the Fund's assets could again be subjected to misuse or mismanagement to the detriment of the pension plan participants.

We believe, therefore, that Labor, in consultation with IRS, should, in its negotiations with the Fund, continue to insist on reforms which will remove the trustees' control over and influence on all the moneys the Fund receives. We also believe Labor should insist that the Fund revise the proposed agreements with Equitable to prevent the weakening of the 1977 agreements.

Labor officials recently told us that the Secretary of Labor has advised the Fund's counsel that he would not approve the proposed contract with Equitable unless two key arrangements are amended. These relate to the (1) trustees' participation in modifying or replacing the Fund's investment policy objectives and (2) exclusion of the provision that the trustees could terminate Equitable and Palmieri only for cause and only with the consent of the Secretary of Labor.

Proposed legislation to provide additional ERISA remedy to safeguard the Fund's assets

You requested our views, Mr. Chairman, on the July 2, 1982, letters from the Departments of the Treasury and Labor requesting that the Committee on Ways and Means enact legislation to provide an additional ERISA remedy to better safeguard the Fund's assets.

In these letters Labor and the Treasury stated that Labor has sought the Fund's agreement, through use of a judicially enforceable consent decree, to require future asset safeguards that would assure that the professional independent managers will continue to manage the Fund's assets. The letters stated that the trustees, notwithstanding their assurances to continue to retain independent asset managers and their agreement to such a condition in IRS' November 11, 1981, determination letter, have steadfastly refused to incorporate such a condition into a judicially enforceable consent decree. The Departments' letters stated therefore, it appears that when Equitable's contract expires in October 1982 the Fund's assets will likely revert back to the direct management of the Fund's trustees.

Also, in commenting on our draft report, Labor said it must be understood, that neither Labor nor any other Federal agency may unilaterally require—through regulation, order, or otherwise—the safeguards we recommended such as an independent asset manager. Labor said that there are only two ways to achieve enforceable requirements regarding such reforms: (1) a voluntary undertaking by the trustees incorporated in a consent decree or (2) the imposition of a court order following successful litigation.

IRS commented that while it is clear that a consent decree would provide the Government with a more effective remedy against the Fund, IRS has no authority under the Internal Revenue Code to secure such decrees. In addition, IRS has determined that it does not have authority to (1) enter into an enforceable contract related to the qualification requirements under the Code or (2) commence other litigative action against the Fund. IRS' remedies against the Fund are limited to disqualification and the imposition of excise taxes in cases of violations of the minimum funding or prohibited transaction requirements.

In their July 2 letters, Labor and Treasury stated that IRS' potential disqualification of the Fund's tax-exempt status may not be effective in deterring the trustees from regaining control over the assets when the Equitable agreement expires. In view of the abuses in the management of the Fund's assets that led to the disqualification of the Fund in 1976, the Departments beleive that action is needed to prevent the trustees from gaining control over the $3.4 billion in assets until the trustees can demonstrate that the reversion will not be harmful to the interests of participating employees.

Labor and Treasury stated it is quite possible that similar situations could arise in the future. The Government must be able to enforce conditions which are deemed of sufficient import to be contained in these determination letters, especially if the conditions have been affirmatively accepted by or on behalf of a plan as was the case with the Fund.

Labor and Treasury have proposed that a new prohibited transaction section be enacted in both the tax and labor provisions of ERISA. Prohibited transactions refer to areas where there is considerable potential for abuse and harm to plan participants. Labor's and Treasury's proposal would provide that where a plan accepts conditions in an IRS qualification letter—relating to the independent management of plan assets and where the trustees or administrators of the plan later violate the conditions—that such a violation would be a *per se* prohbited transaction. This would allow IRS to levy a tax on the amount involved in the violation against the culpable trustees and administrators, and enable Labor to seek an immediate injunction to prevent the violation.

When IRS disqualifies a plan through revocation of its tax-exempt status, the employer, the participating employees, and the plan itself lose the tax benefits of participating in a pension plan qualified under ERISA.

IRS recognized that its revocation of the Fund's tax-exempt status in June 1976 had the potential for a substantial adverse effect on the Fund's estimated 500,000 participants and beneficiaries. IRS testified at congressional hearings in August 1980 [7] that, if the provisions of the revocation had been fully implemented, each of the employees and/or beneficiaries would have been taxed retroactively, on their individual tax returns, for some of the benefits received.

ERISA was enacted to encourage establishment of employee retirement plans and to protect the interests of plan participants. In view of the adverse consequences of disqualification on the innocent employee participants, the possible use by IRS of pension plan disqualification for ERISA abouse is not, in our opinion, the most effective remedy.

We, therefore, strongly support the intent and objective of the Departments of Labor's and Treasury's proposal to provide IRS and Labor an additional enforcement tool under ERISA to safeguard multiemployer plan assets.

[Appendix]

COMPARISON OF THE 1977 AGREEMENTS AND THE PROPOSED NEW AGREEMENTS BETWEEN THE FUND AND INDEPENDENT ASSET MANAGERS—EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES AND VICTOR PALMIERI & CO., INC.

We noted that the proposed new agreements take essentially the same form as the 1977 agreements. However, the new master agreement is between only the trustees and Equitable, with Palmieri consenting thereto in writing, and the new Palmieri investment management agreement is between Equitable and Palmieri, with the trustees consenting thereto in writing.

Under the 1977 agreements, essentially all existing Fund real estate-related assets located east of the Mississippi River are managed by Equitable and those located west of the Mississippi are managed by Palmieri. Further, 25 percent of all securities-related assets and all new funds becoming available for investment are allocated to Equitable for management, and the remaining 75 percent of such assets and new funds were allocated by Equitable to other securities-related investment managers. However, under the proposed new agreements:

All real estate cash flow (i.e., essentially the excess of cash proceeds from Fund real estate investment activities over cash disbursement to such activities) plus 25 percent of new funds (funds derived from employer contributions and made available for investment) will be allocated to Equitable to make new investments in equity real estate, construction and long-term mortgage loans, and interests in real estate joint ventures and partnerships.

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[7] See "Teamsters Central States Pension Fund" hearings, Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, 95th Cong., 2d sess. (Aug. 25 and 26, and Sept. 29 and 30, 1980).

Equitable will continue to manage the securities-related assets of the Fund currently under its control and an additional 15 percent of all new funds will be allocated to Equitable for investments in securities-related assets.

Equitable will have full discretionary authority to transfer funds under its management between the securities and real estate investment accounts that it will maintain for the Fund.

Equitable's (and Palmieri's) real estate management fees will be percentage fees based upon the values of the assets under their management as compared to fixed fees under the current agreements.

The trustees and Equitable will jointly develop investment policies and objectives of the Fund. Under the 1977 agreements, Equitable has exclusive responsibility for developing the Fund's investment policies and objectives.

Finally, any party to any of the new agreements—the trustees, Equitable, or Palmieri—will be permitted to terminate it, with or without cause, by giving a 180-day notice to the other parties. The proposed agreements do not mention obtaining the Government's consent to terminate. Under the 1977 agreements, before October 2, 1982, the trustees could terminate Equitable and Palmieri only for cause and only with the consent of the Secretary of Labor.

Chairman RANGEL. Mr. Pickle.

Mr. PICKLE. I was waiting for your conclusion. You state that you strongly support the intent and objective of the Department of Labor and Treasury proposals to provide the IRS and Labor with this additional tool.

So, in effect, you are saying that the legislation seems to be needed, in your opinion.

Mr. DENSMORE. Yes, sir. We have not looked at different alternatives and we were not aware of this legislation until a week or 10 days ago. But the thrust and intent of this is something that, in our opinion, is needed.

Mr. PICKLE. I also noticed that you had made strong statements that Labor officials, and I assume that you mean those responsible to the Secretary of Labor, have stated they would not be agreeable to any kind of a new agreement unless it was clearly made known that the fund's investment policies and objectives would not be controlled by the fund, and that they could not terminate the contract of either Equitable or Palmieri.

Is that your feeling, that the Department of Labor has clearly made it known that it is not going to sign an agreement with those two provisions in it?

Mr. DENSMORE. That is what we have been advised; yes, sir. We have not been a party to any of the negotiations.

Mr. PICKLE. Can you tell me who advised you from Labor on that question?

Mr. KOWALSKI. It was Mr. Ryan, the Solicitor. He gave us a copy of the letter that the Secretary had sent to the fund's counsel.

Mr. PICKLE. He indicated to you they are not going to sign an agreement unless those two points are cleared up?

Mr. KOWALSKI. That is correct, Congressman.

Mr. PICKLE. And your testimony is that, based on the past track record of the trustees, that we better get this extra legislation, just to be sure?

Mr. DENSMORE. Yes, sir, I think with the only remedy available at the present time being disqualification, which has an adverse impact.

Mr. PICKLE. As an alternative, this would be desirable?

Mr. DENSMORE. This would be desirable; yes, sir.

Mr. PICKLE. Thank you, Mr. Chairman.

Chairman RANGEL. Thank you.

Have you monitored the situation that exists with IRS, Labor, and Justice, since you have written your report, to see whether there has been any improvement?

Mr. KOWALSKI. No, sir. Several times we tried to obtain information from Labor about the status of the second investigation, and they told us they preferred not giving us any information, since it might have an impact on the investigation and any litigation.

So we really don't know very much about what is going on in the second investigation. But, based on the replies from Labor, IRS, and Justice to our draft report, it appears that they have taken some good corrective actions, and many of the problems of the past have apparently been corrected.

For example, in the Labor Department there seems to be a much better relationship between the Solicitor's office and the investigators than in the past. As our report pointed out, and as the Kotch-Crino report pointed out, there was a caustic relationship which, in our opinion, caused the inadequate investigation by Labor.

Chairman RANGEL. But you are not saying, with the exception of matters that are under current investigation, that you are having any problem in having access to monitor the criticisms that were made in your report.

Mr. KOWALSKI. No, sir. They are very cooperative.

Chairman RANGEL. Well, I would like to say that your office has had a reputation, since your inception, in providing information that the Congress needs. And once again, you have reached that same high standard that we have expected from you. We thank you for the work that you have done.

We [illegible] hope that you feel that you have a continued mandate to assist [illegible] following this thing until hopefully to a swift conclusion. [illegible] do find information that Congress should know, we ho[illegible] th[illegible] don't wait to be asked before you bring it to us, because w[illegible]ying to get this matter behind us.

Mr. P[illegible]

Mr. [illegible] further questions.

Cha[illegible] RANGEL. Thank you.

The hearing is adjourned subject to the call of the Chair.

[Whereupon, at 12:40 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

[The following was submitted for the record:]

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT OF THE COMMITTEE ON WAYS AND MEANS,
Washington, D.C., August 11, 1982.

Hon. WILLIAM FRENCH SMITH,
Attorney General, U.S. Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: On July 26, 1982, the Committee on Ways and Means Subcommittee on Oversight held a hearing to review the progress of the Government's efforts to reform the Teamsters' Central States, Southeast and Southwest Areas Pension Fund, and the adequacy of enforcement remedies under the Employee Retirement Income Security Act of 1974 (ERISA). The hearing was, to a great degree, a response to the Administration's urgent request that the Committee consider and report legislation to assure that certain multiemployer employee benefit plans comply with conditions relating to asset management which are contained in Internal Revenue Service issued determination letters. Citing the Teamsters' Central States Pension Fund as illustrative of the need for this legislation, the Administration, by letters dated July 2, 1982 (copies of which are enclosed), urged that an additional ERISA enforcement mechanism be in place by October 3, 1982, to assure that the Central States Fund continues an independent outside asset management arrangement after that date.

During the July 26 Oversight Subcommittee hearing, Secretary of Labor Donovan was questioned about the criminal law enforcement aspects of the Government's efforts to reform the Central States Fund. In order to complete that hearing record, I would appreciate your response to the following questions:

1. What specific role does the Department of Justice, and you as the Attorney General in particular, perform in the Litigation Strategy Task Force which you, along with the Secretaries of Labor and the Treasury, announced on March 4, 1981? Please provide this Subcommittee with a status report on all Department activities relating to the Litigation Strategy Task Force.

2. How many criminal investigations and prosecutions growing out of the administration of the Central States Fund have been conducted by the Department and what is the current status of each? Please include such specific information as (a) the number of investigations and prosecutions by year; (b) the number of indictments obtained; (c) the number and types of convictions obtained; and (d) the number of criminal referrals received from the Department of Labor.

3. Have the coordination problems among the Departments of Labor, Justice and the Treasury that were identified at prior Subcommittee hearings been resolved to the Department's satisfaction?

Thank you for your assistance in this important matter. I would appreciate your responses to these questions by Tuesday, September 7, 1982. If you have any questions, please contact Erwin Hytner, Subcommittee Staff Director, or Rusty Guritz, Assistant Counsel, at 225-5522.

Sincerely yours,

CHARLES B. RANGEL,
Chairman.

[Enclosure No. 1]

U.S. DEPARTMENT OF LABOR,
Washington, D.C., July 2, 1982.

Hon. DAN ROSTENKOWSKI,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to request that your Committee consider legislation which would assure, so far as possible, that trustees and administrators of certain multiemployer employee benefit plans comply with conditions relating to asset management which are contained in Internal Revenue Service issued determination letters. The staffs of the Departments of Labor and Treasury have been working with the staff of the Ways and Means Committee to develop such legislation, which we believe will result in a very useful tool for the safeguarding of plan assets.

Under the Internal Revenue Code, the Internal Revenue Service may issue a determination letter to an employee benefit plan with respect to the qualification of the plan for favorable tax treatment and to the exemption of the trust established under the plan from income taxes. These determination letters may or may not contain certain conditions relating to matters such as the management and disposition of trust assets. Should the administrators or trustees violate one of these conditions, the only remedy potentially available to the IRS is the revocation of the letter. However, this action could cause severe damage to innocent parties such as contributing employers to multiemployer plans and employees who are plan participants. The tax benefits that go along with plan qualification would no longer be available as tax deductions to the employers, and the contributions would be currently taxable to the employees with vested interests in the plan.

We believe that an alternative remedy should be fashioned to deal with this matter. If the IRS believes that circumstances warrant the imposition of such conditions and the administrator or trustees agree to such conditions, the Government should have available the tools to enforce them which do not involve such drastic action as the revocation of determination letters. The case of the Central States Teamsters Pension Fund (the Fund) clearly illustrates the need for such an alternate remedy. This is a matter which we know is of great interest to the Subcommittee on Oversight as evidenced by the hearings the Subcommittee held concerning the Government's handling of this very complex litigation.

In the mid-1970's the IRS and the Department of Labor both concluded that the trustees of the Fund were engaged in various actions that were violations of the tax and labor provisions of the Employee Retirement Income Security Act (ERISA). The IRS, using the only remedy at its disposal, revoked the tax qualification of the fund. Because of the seriousness of the consequences to the contributing employers and the employee plan participants, this action was criticized in many quarters. After protracted negotiations, the trustees agreed to a number of stated conditions which resulted in the issuance of subsequent favorable determination letters. One such condition which was incorporated into the letters and which has been affirmatively accepted by the trustees is the requirement that the assets of the fund—except for a small percentage to be used for payment of benefits and expenses of administration—were to be controlled by an independent asset manager.

The assets of the Fund—which now total approximately $3.5 billion—are presently managed by the Equitable Life Assurance Society of the United States and Victor Palmieri and Company, Incorporated under a contract which is scheduled to expire on October 3, 1982. We believe that it is extremely important that Equitable and Palmieri, or some other qualified independent manager, continue to exercise control over these assets following the expiration of the contract. It is worthy of note that this Department has brought suit against the present trustees of the Fund alleging misuse of plan assets. In addition, as you know, the General Accounting Office has found that the current trustees of the Fund have repeatedly and openly sought to undermine the independence of the investment managers and to reassert control over the Fund's assets and investments. Further, GAO voiced concern over the current trustees' apparent attempt to make an improper $91 million loan as part of an out-of-court settlement of a law suit.

In the context of our litigation the Department has sought, through the implementation of a judicially enforceable consent decree, agreed to by the Fund, to require future asset safeguards that would assure the assets continue to be managed professionally by independent managers. The trustees, however, notwithstanding their repeated assurances that they intend to continue to retain independent management of the assets, and their express agreement to such management as a condition of the most recent requalification letter, have steadfastly refused to incorporate such a condition into a judicially enforceable consent decree. Therefore, it appears that upon the expiration of the present Equitable contract, there exists a significant likelihood that the Fund's assets will revert back to the direct management of the Fund's trustees.

We believe action is needed to prevent the $3.5 billion from reverting back to the control of people whose judgment we have good reason to question in light of the fact that their actions could seriously jeopardize the retirement future of the hundreds of thousands of individuals who are either participants or beneficiaries of the Fund.

We do not stand alone in our determination that the assets should be independently managed. Various Members of Congress have voiced similar expressions of concern to us. In addition, as you are aware, the General Accounting Office, in a report of the Comptroller General dated April 28, 1982 expressed concern that the trustees could shortly gain control of all the assets. The GAO stated their view that it is imperative that continued management of the Fund's assets by a responsible, independent asset manager be assured beyond the terms of the 5-year contract with Equitable and Palmieri which expires on October 3, 1982 and recognized the need for a mechanism requiring the trustees to meet criteria similar to those estabished in the qualification letter.

It is quite possible that similar situations could arise in the future. The Government must be able to enforce conditions which are deemed of sufficient import to be contained in these determination letters, especially if the conditions have been affirmatively accepted by or on behalf of the Fund, as was the case with the Central States Fund.

There appears to be a way of using the qualification letter mechanism without incurring the adverse consequences of revocation. In enacting ERISA, the Congress recognized that there were areas where there was considerable potential for abuse and potential for harm to plan participants. For these matters there was created a category of transactions called a "prohibited transaction" which enables the IRS and the Labor Department to apply remedies on behalf of participants that would not involve the use of disqualification.

A new prohibited transaction could be enacted in both the tax and labor provisions of ERISA. Such provisions would provide that where a plan affirmatively accepts conditions in a qualification letter relating to the independent management of plan assets and where the trustees or administrators of the plan later violate the conditions, that such a violation would be a per se prohibited transaction. This would allow the IRS to levy a tax on the amount involved in the violation against the culpable trustees and administrators, and it would also enable the Department of Labor to immediately seek an injunction to prevent the violation. Both agencies would have the tools to effectively remedy a serious situation with the remedies directed solely against those responsible.

The Administration urges your Committee to take prompt action on legislation to effectuate these objectives. It is important that the statutory protections be in place by October 3 of this year to insure that the Central States Fund continues to be managed in a highly competent, professional, and responsible manner, and that similar conditions for other plans are respected and complied with by trustees and administrators.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program and enactment of such legislation would be consistent with the objectives of the Administration.

Sincerely,

RAYMOND J. DONOVAN.

[Enclosure No. 2]

DEPARTMENT OF THE TREASURY,
Washington, D.C., July 2, 1982.

Hon. DAN ROSTENKOWSKI,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to request that your Committee consider legislation which would assure, so far as possible, that trustees and administrators of certain multiemployer employee benefit plans comply with conditions relating to asset management which are contained in Internal Revenue Service issued determination letters. The staffs of the Departments of Labor and Treasury have been working with the staff of the Ways and Means Committee to develop such legislation, which we believe will result in a very useful tool for the safeguarding of plan assets.

Under the Internal Revenue Code, the Internal Revenue Service may issue a determination letter to an employee benefit plan with respect to the qualification of the plan for favorable tax treatment and to the exemption of the trust established under the plan from income taxes. These determination letters may or may not contain certain conditions relating to matters such as the management and disposition of trust assets. Should the administrators or trustees violate one of these conditions, the only remedy potentially available to the IRS is the revocation of the letter. However, this action could cause severe damage to innocent parties such as contributing employers to multiemployer plans and employees who are plan participants. The tax benefits that go along with plan qualification would no longer be available as tax deductions to the employers, and the contributions would be currently taxable to the employees with vested interests in the plan.

We believe that an alternative remedy should be fashioned to deal with this matter. If the IRS believes that circumstances warrant the imposition of such conditions and the administrator or trustees agree to such conditions, the Government should have available the tools to enforce them which do not involve such drastic action as the revocation of determination letters. The case of the Central States Teamsters Pension Fund (the Fund) clearly illustrates the need for such an alternate remedy. This is a matter which we know is of great interest to the Subcommittee on Oversight as evidenced by the hearings the Subcommittee held concerning the Government's handling of this very complex litigation.

In the mid-1970's the IRS and the Department of Labor both concluded that the trustees of the Fund were engaged in various actions that were violations of the tax and labor provisions of the Employee Retirement Income Security Act (ERISA). The IRS, using the only remedy at its disposal, revoked the tax qualification of the fund. Because of the seriousness of the consequences to the contributing employers and the employee plan participants, this action was criticized in many quarters. After protracted negotiations, the trustees agreed to a number of stated conditions which resulted in the issuance of subsequent favorable determination letters. One such condition which was incorporated into the letters and which was agreed to and accepted by the trustees is the requirement that the assets of the fund—except for a small percentage to be used for payment of benefits and expenses of administration—were to be controlled by an independent asset manager.

The assets of the Fund—which now total approximately $3.5 billion—are presently managed by the Equitable Life Assurance Society of the United States and Victor Palmieri and Company, Incorporated under a contract which is scheduled to expire on October 3, 1982. We believe that it is extremely important that Equitable and Palmieri, or some other qualified independent manager, continue to exercise control over these assets following the expiration of the contract. It is worthy of note that the Department of Labor has brought suit against the present trustees of the Fund alleging misuse of plan assets. In addition, as you know, the General Accounting Office has found that the current trustees of the Fund have repeatedly and openly sought to undermine the independence of the investment managers and to reassert control over the Fund's assets and investments. Further, GAO voiced concern over the current trustees' apparent attempt to make an improper $91 million loan as part of an out-of-court settlement of a law suit.

In the context of this litigation the Department of Labor has sought, through the implementation of a judicially enforceable consent decree, agreed to by the Fund, to require future asset safeguards that would assure the assets continue to be managed professionally by independent managers. The trustees, however, notwithstanding their repeated assurances that they intend to continue to retain independent management of the assets, and their express agreement to such management as a condition of the most recent determination letter, have steadfastly refused to incorporate such a condition into a judicially enforceable consent decree. Therefore, it appears that upon the expiration of the present Equitable contract, there exists a significant likelihood that the Fund's assets will revert back to the direct management of the Fund's trustees.

As we stated previously, although the Fund's trustees have agreed to the detemination letter condition requiring that assets be managed by independent managers, the potential disqualification of the Fund may not be effective in deterring the trustees from regaining control over the assets when the Equitable agreement expires. In view of the abuses in the management of the Fund's assets that led to the disqualification of the Fund in 1976, we believe that action is needed to prevent the reversion of approximately $3.5 billion of assets to the trustees until it can be demonstrated that the reversion will not be harmful to the interests of participating employees.

We do not stand alone in our determination that the assets should be independently managed. Various Members of Congress have voiced similar expressions of concern. In addition, as you are aware, the General Accounting Office, in a report of the Comptroller General dated April 28, 1982 expressed concern that the trustees could shortly gain control of all the assets. The GAO stated their view that it is imperative that continued management of the Fund's assets by a responsible, independent asset manager be assured beyond the term of the 5-year contract with Equitable and Palmieri which expires on October 3, 1982 and recognized the need for a mechanism requiring the trustees to meet criteria similar to those established in the qualification letter.

It is quite possible that similar situations could arise in the future. The Government must be able to enforce conditions which are deemed of sufficient import to be contained in these determination letters, especially if the conditions have been affirmatively accepted by or on behalf of a plan as was the case with the Central States Fund.

There appears to be a way of using the qualification letter mechanism without incurring the adverse consequences of revocation. In enacting ERISA, the Congress recognized that there were areas where there was considerable potential for abuse and potential for harm to plan participants. For these matters there was created a category of "prohibited transactions" which enables the IRS and the Labor Department to apply remedies on behalf of participants that would not involve the use of disqualification.

A new prohibited transaction could be enacted in both the tax and labor provisions of ERISA. Such provisions would provide that where a plan affirmatively accepts conditions in a qualification letter relating to the independent management of plan assets and where the trustees or administrators of the plan later violate the conditions, that such a violation would be a per se prohibited transaction. This would allow the IRS to levy a tax on the amount involved in the violation against the culpable trustees and administrators, and it would also enable the Department of Labor to seek an immediate injunction to prevent the violation. Both agencies would have the tools to effectively remedy a serious situation with the remedies directed solely against those responsible.

The Administration urges your Committee to take prompt action on legislation to effecuate these objectives. It is important that the statutory protections be in place by October 3 of this year to insure that the Central States Fund continues to be managed in a highly competent, professional and responsible manner, and that similar conditions for other plans are respected and complied with by trustees and administrators.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this legislative proposal to the Congress and that its enactment would be consistent with the Administration's objectives.

Sincerely,

JOHN E. CHAPOTON,
Assistant Secretary (Tax Policy).

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
Washington, D.C., September 9, 1982.

Hon. CHARLES B. RANGEL,
Chairman, Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is a response to your letter of August 11, 1982, in regard to the Teamsters' Central States, Southeast and Southwest Areas Pension Fund (hereafter referred to as the "Fund"). Your letter requests information concerning the Department of Justice's role in the Litigation Strategy Task Force on matters related to the Fund, the number of criminal investigations and prosecutions related to the Fund, and the resolution of coordination problems among Government agencies which had been identified at prior hearings of the Subcommittee on Oversight.

With respect to the role performed by the Department of Justice in the Litigation Strategy Task Force, the Subcommittee should distinguish the interests of the Department's Criminal and Civil Divisions which are separately represented on the task force's working group. Although the Attorney General and the Associate Attorney General have been personally briefed on occasion by the Secretary of Labor and the Solicitor of Labor concerning the status of civil litigation being currently pursued by the Labor Department against the Fund and former trustees of the Fund, the working group, chaired by the Solicitor of Labor and including representatives of the Internal Revenue Service, the Civil and Criminal Divisions, and the relevant program agencies within the Labor Department, has met approximately 20 times during 1981-82 to consider the effect of the civil litigation on the component agencies' other law enforcement efforts involving the Fund.

CRIMINAL DIVISION

The Criminal Division's role in the task force is limited primarily to monitoring the progress of the civil litigation with a view toward avoiding problems which can arise when criminal and civil investigations and/or prosecutions are pursued simultaneously in regard to particular individuals and organizations. As the former Deputy Assistant Attorney General, Criminal Division, testified in March 1980 before the Subcommittee on Oversight in hearings on the Fund, the primary thrust of the Employee Retirement Income Security Act (ERISA) is the protection of employee benefit plan participants through civil means with the Secretary of Labor possessing broad enforcement power. Criminal prosecutions, of course, are an important complement to those civil remedies and can reach other kinds of labor racketeering not covered by ERISA. Like the former Deputy Assistant Attorney General who testified in 1980, we believe that the friction which may have developed between the Departments of Labor and Justice in the past over access to evidence and coordination of parallel criminal and civil proceedings has been overcome by the efforts of working groups like the one described above and the efforts of those higher officials in the two Departments who are available to resolve coordination problems which can not be satisfactorily resolved at lower levels. We have had no reason to change our view since March 1980.

CIVIL DIVISION

Civil litigation arising under ERISA is conducted by the Department of Labor, subject to the direction and control of the Attorney General. This supervisory function is performed by the Civil Division of the Department of Justice. The Civil Division regularly sends a representative to meetings of the Litigation Strategy Task Force. At those meetings, the Labor Department informs the participants of the status of the various pending cases involving the Fund. Although primary litigation responsibility for these cases has been delegated to Labor, the meetings do provide the Civil Division with an opportunity to make comments and suggestions as to the future conduct of the various pending cases. In addition, it is the responsibility of the Civil Division to approve the filing of all new affirmative suits arising under ERISA. The meetings are helpful in performing this function because they provide information on matters under investigation and on proposed legal action under consideration by Labor. Since the Task Force was established, the Civil Division has approved the filing of several new actions involving the Fund. Primary responsibility for the conduct of these actions has also been delegated to Labor.

Over the last several months, the principal focus of the Task Force meetings has been on the progress of settlement negotiations between the Labor Department and representatives of the Fund covering several of the pending cases. Although Justice Department approval is generally not requested for the settlement of cases which have been delegated to Labor, the Civil Division, at the request of the Department of Labor, has taken a more active role in the significant cases involving the Fund. Although the Civil Division does not participate in the negotiations with Fund representatives, the Civil Division has reviewed and commented upon the various written proposals and counter-proposals made by Labor. In addition, the Civil Division has retained final responsibility for the approval of any settlement agreement tentatively reached by the Fund representatives and the Department of Labor.

CRIMINAL PROSECUTIONS AND INVESTIGATIONS

In regard to criminal prosecutions related to transactions involving the Fund, we have enclosed a copy of a letter sent by this Department to the Chairman of the Senate Permanent Subcommittee on Investigations on October 11, 1977. That letter refers to the conviction of 13 individuals and the acquittal or reversal of conviction with respect to six individuals in eight such cases between 1964 and 1977.

The 1978 conviction of a former asset manager of the Fund in *United States* v. *Alvin Baron,* 76 Cr 1248-1 (N.D. Ill.) for solicitation of kickbacks (18 U.S.C. 1954), wire fraud (18 U.S.C. 1343) and filing a false tax return was discussed in the Subcommittee's 1980 hearing on the Fund. *See* Hearing before the House Subcommittee on Oversight, 96th Cong., 2d Sess., Serial 96-85 (March 24, 1980), p. 75. The 1978 indictment of Joseph Hauser and three of his associates in *United States* v. *Joseph Hauser, et al.,* Cr. 78-204 PHX (D. Ariz.) in connection with the theft of insurance premiums, collected in part from the Central States Health and Welfare Fund was also discussed in the 1980 hearing. *See* March 24, 1980 Hearing, pp. 75-76. Therefore, we have provided an update as to the status of that case despite the fact that Pension Fund assets were not involved. Following his guilty plea, Hauser was sentenced to serve two years in prison with five years' probation in that case. Codefendant Bernard Ruben was sentenced to serve 10 years' imprisonment. Codefendant Brian Kavanaugh's guilty plea was ultimately withdrawn and the charges were dismissed by the trial court. Following a successful appeal, George Herrara was acquitted of the charges by the trial court in 1981.

Following an investigation of an $11 million construction loan by the Fund to finance a jai alai complex in Bridgeport, Connecticut, the president of the borrowing firm was indicted in 1979 for alleged false bank loan applications in connection with the project. The case was dismissed in 1980 on motion of the United States Attorney. *United States* v. *David Friend,* Cr. N-79-35 (D. Conn.).

The 1979 indictment in *United States* v. *Lee Linton, et al.,* Cr. 79-83 (D. Nev.), which charged a scheme to defraud the Fund by inflated cost overruns and to extort kickbacks from subcontractors in connection with the Fund's loan of $34 million to the Aladdin Hotel, was also discussed in the 1980 hearings. See March 24, 1980, Hearing, p. 76. Following the acquittal in November 1981 of six individual and two corporate defendants for the conspiracy portion of the case and the anticipated dismissal of other charges on the Government's motion, the charges remaining to be tried will consist of two counts of extortion (18 U.S.C. 1951) and three counts of tax evasion against defendant Linton and two counts of false tax returns against defendant Sorkis J. Webbe.

The 1980 indictment in *United States* v. *Mayer Morganroth and Marvin Kopitz,* Cr. 9-80313 (E.D. Mich.), which was discussed in the 1980 hearings, resulted in an acquittal after trial on March 25, 1980. On May 22, 1981, a Federal grand jury in Chicago returned an 11 count indictment charging conspiracy to bribe a United States Senator, interstate travel in furtherance of the bribery, and wire fraud in connection with the proposed sale of certain real property owned by the Fund near Las Vegas, Nevada. Among the five defendants are International Teamster President Roy Lee Williams, former Pension Fund consultant Allen Dorfman, current

Pension Fund trustee Thomas F. O'Malley, and Fund Director of Labor Relations Andrew G. Massa. Trial in the case, *United States* v. *Dorfman, et al.*, 81 Cr. 269 (N.D. Ill.) is scheduled to begin in Chicago on October 4, 1982.

In regard to criminal investigations related to Pension Fund transactions it is sometimes difficult to determine when certain transactions first came to the attention of Federal law enforcement authorities. Therefore, the following figures reflect only the year in which such investigations were closed without prosecution for lack of evidence or because of the statute of limitations. Investigations which did result in the prosecutions noted above are not reflected in these figures. Furthermore, because our files are not necessarily referenced to the Pension Fund, we do not purport the list to be exhaustive. In 1978 one (1) matter, in 1979 five (5) matters, in 1980 eight (8) matters, in 1981 five (5) matters, and in 1982 two (2) matters were closed without prosecution. At the present time the Criminal Division is aware of nine (9) matters involving transactions related to the Pension Fund which are being investigated or are under review.

With respect to matters related to the Pension Fund which were formally referred by the Department of Labor for possible criminal prosecution, the Labor Department has advised the General Accounting Office that it is able to document the formal referral of five loan-related matters in 1977, five in 1978, and one in 1979. Our records further disclose that two matters related to transactions involving the Pension Fund were referred in 1981 and that one such matter has been referred in 1982. The 1982 referral may disclose new information concerning a matter previously investigated. Of course, because of the normal interaction among personnel in the two Departments outside Washington, D.C., it is possible and very likely that many of the investigations and prosecutions discussed above were generated by means of informal referrals in the field.

In summary, we believe that the coordination problems between the Departments of Justice and Labor which were cited at previous hearings before the Subcommittee on Oversight have been satisfactorily resolved. There are currently seventy-four (74) working agents and supervisors assigned to organized crime strike forces by the Labor Inspector General's Office of Organized Crime and Racketeering. The threatened curtailment in the assignment of Labor Department investigators to the strike forces was a matter of prime concern at the 1978 hearings. We are also pleased to report that plans are being made by the Labor Department's Office of Pension Welfare Benefit Programs to increase the number of criminal investigations which agents assigned to employee benefit plan matters are able to pursue. Moreover, with respect to the disclosure of income tax information to criminal investigators, which was discussed by the former Deputy Assistant Attorney General of the Criminal Division in the 1980 hearings, we welcome the passage by the Congress of H.R. 4961 on August 19, 1982, which contains provisions liberalizing the disclosure of tax information in criminal cases.

If we can be of further assistance to you in these matters, please feel free to contact me.

Very truly yours,

D. LOWELL JENSEN,
Assistant Attorney General, Criminal Division.

Enclosure.

OCTOBER 11, 1977.

Hon. HENRY M. JACKSON,
Chairman, Senate Permanent Subcommittee on Investigations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I would like to express my appreciation for the opportunity to appear before the Subcommittee on behalf of the Justice Department to explain its role in the joint Justice Department/Labor Department investigation of the Teamsters' Central States, Southeast and Southwest Areas Pension Fund. During the course of my testimony members of the Subcommittee posed two questions, the answers to which I did not have at the time which I agreed, to the extent that it was possible, to furnish to the Subcommittee.

First, I was asked to supply a list of all indictments returned and convictions obtained by the Department arising out of transactions involving the Pension Fund. The following list encompasses most of the indictments and convictions in matters arising out of Fund related transactions. Because our filing system is based on the names of individual defendants and is not necessarily cross-referenced to the Pension Fund it is possible the list is not exhaustive, especially in the area of criminal tax cases.

United States v. *Benjamin Cohen.* Mr. Cohen was convicted of violations of the Internal Revenue Code in connection with his failure to report income obtained from a finder's fee paid to him for a loan made by the Pension Fund.

United States v. *James R. Hoffa, Benjamin Dranow, Zachary A. Strate, George Durnis, Abe I. Weinblatt and Kalvin Kovens.* In 1964 these individuals were convicted of conspiracy and mail or wire fraud in connection with a scheme whereby various borrowers from the Pension Fund paid kickbacks to the defendants who, in turn, used the proceeds of the kickbacks to pay off Mr. Hoffa's personal obligations.

United States v. *David Wenger, Jack McCarthy and Leonard Russo.* In April 1970 Leonard Russo and Jack McCarthy were convicted of conspiring to pay a kickback and payment of a kickback to influence David Wenger, accountant for the Pension Fund, in the performance of his duties. Wenger was convicted of conspiring to receive a payment and receiving a payment in order to influence the Pension Fund to make a loan.

United States v. *David Wenger and John J. Keilly.* In November of 1970 Wenger was again convicted of conspiring to receive and with receiving a kickback to influence the Fund to make a loan. Keilly was convicted of conspiring to pay a kickback and payment of a kickback to Wenger. Nine other defendants were acquitted. Subsequent to these convictions Wenger also pled guilty to three more indictments charging him with accepting kickbacks to influence the Pension Fund to make loans to various borrowers.

United States v. *Allen Dorfman.* In 1972 Allen Dorfman, a consultant to and employee of the Pension Fund, was convicted of conspiring to receive a kickback and to use the mails to defraud and of mail fraud violations in connection with his receipt of a payment to influence the Fund to make a loan.

United States v. *Frank Ragano.* Mr. Ragano was convicted of multiple violations of the Internal Revenue Code because of his failure to report as income a $225,000 finder's fee he received from the borrower of a loan made by the Pension Fund.

United States v *Irwin Weiner, Ronald DeAngeles, Anthony Spijotro, Allen Dorfman, Jack Sheetz and Albert Matheson.* In 1975 these individuals were acquitted of charges of embezzling from the Pension Fund, using the mails to defraud the Fund and of Revenue Code violations.

United States v. *Nicholas Tweel.* In 1975 Mr. Tweel was convicted of Internal Revenue Code violations because of his failure to declare a finder's fee paid to him on a Pension Fund loan. In 1977 the conviction was reversed on appeal and the government subsequently dismissed the indictment.

United States v. *Alvin Baron.* In 1976 Alvin Baron, former asset manager of the Pension Fund, was indicted for conspiracy to receive a kickback to influence the Fund to make a loan, mail and wire fraud in connection with his receipt of the kickback and with an Internal Revenue Code violation. This case is awaiting trial.

Second, I was asked to provide the number of FBI agents working on matters stemming from this investigation on any given day. I regret to say that the FBI has informed us that its system of case assignment and investigation makes it exceedingly difficult, if not impossible, to provide us with the figures requested. However, the FBI did assure me that all investigative manpower needed to vigorously and fully investigate any Pension Fund matter is and will be provided.

I can also assure you that the Department has the same commitment with respect to attorney manpower. I should also note that several Postal Inspectors are assisting our efforts and that Agents of the Internal Revenue Service have been and will be requested to assist us when such assistance is permitted by the Tax Reform Act.

Sincerely,

John C. Keeney,
Deputy Assistant Attorney General, Criminal Division.